Supreme Court, U.S.
FILED

03 762 NOV 21 2003

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

SANTEE SIOUX TRIBE OF NEBRASKA,
A FEDERALLY RECOGNIZED INDIAN TRIBE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Johnson Act, 15 U.S.C. 1171 *et seq.*, prohibits, among other things, the possession or use of "any gambling device" within Indian country. The Johnson Act defines a gambling device to include "any * * * machine or mechanical device" that is "designed and manufactured primarily for use in connection with gambling, and * * * by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property." 15 U.S.C. 1171(a)(2).

The question presented in this case is whether the Lucky Tab II machine is excluded from that definition because a player becomes entitled to receive money as a result of the sequence of winning and losing pull-tabs on a pre-printed paper roll inserted into the machine.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 324 F.3d 607. The opinion of the district court (App., *infra*, 18a-33a) is reported at 174 F. Supp. 2d 1001.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 2003. A petition for rehearing was denied on June 25, 2003 (App., *infra*, 34a). On September 15, 2003, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including October 23, 2003, and, on October 13, 2003, Justice

Thomas extended that time to and including November 22, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of Titles 15 and 25 of the United States Code are reproduced at App., *infra*, 35a-41a.

STATEMENT

This is one of two cases recently decided by the courts of appeals that concern the relationship between the Johnson Act, 15 U.S.C. 1171 *et seq.*, which prohibits the use of "any gambling device" in Indian country, and the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.*, which authorizes the use of gambling devices in Indian country in accordance with a tribal-state compact approved by the Secretary of the Interior. In this case, the Eighth Circuit held, in conflict with the Tenth Circuit in *Seneca-Cayuga Tribe of Oklahoma* v. *National Indian Gaming Commission*, 327 F.3d 1019 (2003), that IGRA does not provide Tribes with any exemption from the Johnson Act when they use gambling devices in the absence of an approved tribal-state compact. The Eighth Circuit then held, in conflict with the Ninth Circuit in *United States* v. *Wilson*, 475 F.2d 108 (1973), that the machine at issue in this case does not satisfy the Johnson Act's definition of gambling device. That holding has significant ramifications for federal regulation of gambling devices inside and outside Indian country. The government is also filing a certiorari petition in *Seneca-Cayuga Tribe*, presenting the question on which the Eighth and Tenth Circuits are in conflict.

1. a. The Johnson Act prohibits, among other things, the manufacture, sale, transportation, possession, or

use of "any gambling device" within the District of Columbia, federal enclaves and possessions, and, as relevant here, "Indian country." 15 U.S.C. 1175(a). The Johnson Act also prohibits the transportation of gambling devices in interstate commerce to or from any place in which their operation is unlawful. 15 U.S.C. 1172(a). The Johnson Act defines a "gambling device" to include not only traditional slot machines, see 15 U.S.C. 1171(a)(1), but also any other machine or mechanical device that is:

> designed and manufactured primarily for use in connection with gambling, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property.

15 U.S.C. 1171(a)(2).

b. In 1987, this Court held in *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, that a State cannot prohibit bingo and card games on Indian reservations if the State allows such games elsewhere. In the wake of that decision, Congress enacted IGRA in 1988 "to provide a statutory basis for the operation and regulation of gaming by Indian tribes." *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 48 (1996) (citing 25 U.S.C. 2702). The purposes of IGRA include enabling Tribes to conduct gaming to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments," 25 U.S.C. 2702(1), and providing a regulatory structure adequate to "shield [tribal gaming] from organized crime and other corrupting influences * * * and to assure that gaming is conducted fairly and

honestly by both the operator and players," 25 U.S.C. 2702(2).

IGRA establishes three classes of Indian gaming, each of which is subject to a distinct regulatory regime. *Class I* gaming consists of social games played solely for prizes of minimal value and traditional forms of Indian gaming. Tribes have exclusive jurisdiction to regulate such games. See 25 U.S.C. 2703(6), 2710(a)(1).

Class II consists, as relevant here, of "the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) * * * including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo." 25 U.S.C. 2703(7)(A)(i)(I). Class II excludes "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." 25 U.S.C. 2703(7)(B)(ii). Class II gaming is permissible "within a State that permits such gaming for any purpose by any person, organization or entity," provided that "such gaming is not otherwise specifically prohibited on Indian lands by Federal law." 25 U.S.C. 2710(b)(1)(A). Class II gaming is subject to regulation by the National Indian Gaming Commission (NIGC), see 25 U.S.C. 2706, as well as by Tribes themselves.

Class III is defined as "all forms of gaming that are not class I gaming or class II gaming." 25 U.S.C. 2703(8). Such gaming is permissible only if it occurs in a State that permits it, is conducted in conformance with a tribal-state compact approved by the Secretary of the Interior, and is authorized by a tribal ordinance approved by the Chairman of the NIGC. 25 U.S.C. 2710(d). IGRA contains an express exception from the Johnson Act for gambling devices used in Class III gaming. IGRA states that "[t]he provisions of section

1175 of title 15 [the Johnson Act] shall not apply to any gaming conducted under a Tribal-State compact that—(A) is entered into under [25 U.S.C. 2710(d)(3)] by a State in which gambling devices are legal, and (B) is in effect." 25 U.S.C. 2710(d)(6). IGRA contains no comparable exemption for gambling devices used in Class II gaming.

2. Beginning in early 1993, respondent Santee Sioux Tribe of Nebraska attempted unsuccessfully to negotiate a Class III gaming compact with the State of Nebraska. In early 1996, notwithstanding the absence of any such compact, the Tribe opened a Class III gaming casino on its reservation. The casino offered video slot machines, video poker machines, and video blackjack machines. App., *infra*, 2a, 19a; Gov't C.A. Br. 3.

The NIGC ordered the Tribe to close the casino, because it was engaging in Class III gaming in violation of IGRA's requirement of a tribal-state compact. The Tribe refused to comply with the closure order. App., *infra*, 2a, 19a; Gov't C.A. Br. 3.

In response, the United States filed this suit against the Tribe to enforce the closure order. Although the district court dismissed the suit, the court of appeals reversed, holding that the Tribe was operating the casino in violation of IGRA and state law and that injunctive relief was warranted. App., *infra*, 2a, 20a; *United States* v. *Santee Sioux Tribe of Nebraska*, 135 F.3d 558 (8th Cir. 1998).

The Tribe continued to operate the casino. The district court issued an order enjoining the Tribe from doing so and imposed fines for contempt of the order. Although the district court ruled that tribal officials could not be held individually liable for the contempt fines, the court of appeals reversed that ruling. App.,

infra, 2a-3a, 20a; *United States* v. *Santee Sioux Tribe of Nebraska*, 254 F.3d 728 (8th Cir. 2001).

In May 2001, the Tribe removed the existing Class III gambling devices from its casino and replaced them with Lucky Tab II devices. The Tribe was encouraged to take such action by the NIGC's Acting Chief of Staff, who took the position that Lucky Tab II is a "technologic aid" to the game of pull-tabs, and thus is a Class II device that the Tribe could use without entering into a compact with the State. After the Lucky Tab II machines were installed, the NIGC dissolved its closure order. App., *infra*, 3a, 21a, 28a.

The Lucky Tab II machine has been designed to look, sound, and play much like a video slot machine. App., *infra*, 3a (observing that Lucky Tab II machines "look and sound very much like traditional slot machines"). Lucky Tab II, like a slot machine, is housed in an illuminated cabinet. The player deposits money into the machine, presses a button to activate the machine, and views a video display and hears a sound indicating whether or not he has won. As the Tenth Circuit observed with respect to the similar Magical Irish machine, playing such devices "can be a high-stakes, high-speed affair," as a player can complete a game "every seven seconds." *Seneca-Cayuga Tribe*, 327 F.3d at 1025.

Lucky Tab II differs in its design to some extent from the typical slot machine or other gambling device. Whether the player of Lucky Tab II wins or loses is determined by the sequence of bar codes on a pre-printed paper roll of pull-tabs that is inserted into the machine. (Similar paper rolls have been used to supply pull-tabs to be purchased by persons playing the traditional game of paper pull-tabs without a machine.) When the player presses a button, a machine reads the

bar code on the next pull tab on the roll, which triggers the video display and accompanying sound, and then dispenses the pull-tab to the player. The video screen depicts a grid that is similar in appearance to that of a slot machine. If the screen indicates that the pull-tab is a winner, the player may obtain money for the winning pull-tab only by presenting it to a cashier at the casino. In addition to relying on the video screen, the player is free to open the pull-tab manually to see whether it is a winner. See App., *infra*, 3a-4a.

3. The Tribe moved the district court for relief from its earlier contempt orders based upon the Tribe's replacement of its video poker, video blackjack, and video slot machines with Lucky Tab II machines. The United States countered that the Tribe was not entitled to relief, because Lucky Tab II could not lawfully be used at its casino for either of two reasons: first, Lucky Tab II is a gambling device prohibited in Indian country by the Johnson Act, and, second, Lucky Tab II is a Class III device under IGRA that cannot be operated without a tribal-state compact.

The district court, after an evidentiary hearing, granted the Tribe's motion. App., *infra*, 18a-33a. The court held that "the Johnson Act is not applicable to Class II devices" as defined in IGRA. App., *infra*, 26a. The court then held that Lucky Tab II "is a technological aid to the game of pull-tabs, and thus is a Class II device." *Id.* at 32a. The court relied on findings that, *inter alia*, the machine, as distinguished from the pull-tab roll inserted into the machine, does not determine winners and losers, the machine does not dispense money, the machine "adds to the entertainment value" of pull-tabs, and the machine is "not an exact replica of pull-tabs." *Ibid.*

4. The court of appeals affirmed. App., *infra*, 1a-17a.

At the outset, the court of appeals held, contrary to the district court, that IGRA does not provide an implied exemption from the Johnson Act for gambling devices that are used by Tribes as technologic aids to Class II gaming. App., *infra*, 6a-8a. The court of appeals explained that IGRA, by confining Class II gaming to "gaming [that] is not otherwise specifically prohibited on Indian lands by Federal law," 25 U.S.C. 2710(b)(1)(A), "clearly states that class II devices may be regulated by another federal statute—obviously the Johnson Act." App., *infra*, 7a. Accordingly, the court held that, in order for a device to be used by a Tribe in Indian country in the absence of a tribal-state compact, the device *both* must not be a "gambling device" under the Johnson Act *and* must be a "technologic aid" under IGRA. *Id.* at 7a-8a.

With respect to the Johnson Act, the court of appeals did not dispute that Lucky Tab II is "manufactured primarily for use in connection with gambling," which is one of the elements for classification as a gambling device under Section 1171(a)(2). The court held, however, that Lucky Tab II does not meet the other requirements for classification as a gambling device under either clause (A) or clause (B) of Section 1171(a)(2). The court reasoned that Lucky Tab II is not a device "which when operated may deliver, as the result of the application of an element of chance, any money or property," 15 U.S.C. 1171(a)(2)(A), because "the machines do not deliver any money or property," but instead deliver a paper pull-tab that can be redeemed for money. App., *infra*, 8a. The court also reasoned that Lucky Tab II is not a device "by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property," 15 U.S.C. 1171(a)(2)(B), because

"[t]he user of the machine does not become entitled to receive money or property as a result of the *machine's* application of an element of chance." App., *infra*, 9a. Instead, the court reasoned that whether a player wins or loses is determined by the sequence of paper pull-tabs on the pre-printed roll inserted into the Lucky Tab II machine. *Ibid.* The court acknowledged that, "[i]f, however, the Lucky Tab II machines were computer-generated versions of the game of pull-tabs itself, or perhaps, even if it randomly chose which pull-tabs from the roll it would dispense, it could fall within" the Johnson Act. *Ibid.*

With respect to IGRA, the court of appeals held that Lucky Tab II is a permissible "technologic aid" to the game of pull-tabs, and not a prohibited "electronic or electrotechnical facsimile[]" of that game. App., *infra*, 10a-17a. The court reasoned that "the machines do not replicate pull-tabs; rather, the player using the machine *is playing* pull-tabs." *Id.* at 15a. The court also noted that the NIGC had recently promulgated a regulation that defined permissible Class II technologic aids to include "pull tab dispensers and/or readers." 25 C.F.R. 502.7(c). The court viewed the regulation as "suggesting that the NIGC has now given its imprimatur to these types of machines." App., *infra*, 16a.

REASONS FOR GRANTING THE PETITION

The court of appeals held that the Lucky Tab II machine, although indisputably "designed and manufactured primarily for use in connection with gambling," 15 U.S.C. 1171(a)(2), is not a "gambling device" within the meaning of the Johnson Act. The court of appeals was mistaken. The Johnson Act defines the term "gambling device" in the most expansive terms possible, precisely to prevent ingenious manufacturers from slipping their

devices through some linguistic loophole. Nothing in the Johnson Act provides any basis for excluding a device such as Lucky Tab II that looks like a slot machine, sounds like a slot machine, and plays like a slot machine—simply because whether players of the device win or lose is determined not by its permanent mechanical components operating in isolation, but through a paper roll printed with bar codes that are read by the device. The Ninth Circuit, contrary to the Eighth Circuit here, has held that the Johnson Act applies to similar devices. The Eighth Circuit's decision opens the door to circumvention of the Johnson Act's prohibitions on gambling devices, not only in Indian country, but in the other places in which the Act applies, such as federal enclaves and possessions. It also impairs the United States' ability under the Johnson Act to prosecute the shipment of gambling devices into States that prohibit them, and thereby to assist the States in their own gambling regulation.

I. THE JOHNSON ACT'S DEFINITION OF "GAMBLING DEVICE" DOES NOT TURN ON ARBITRARY DISTINCTIONS ABOUT WHETHER OR NOT WINNERS ARE DETERMINED BY THE MECHANICAL OPERATIONS OF THE DEVICE

The court of appeals held that Lucky Tab II does not satisfy the Johnson Act's definition of a "gambling device," reasoning that a player "does not become entitled to receive money or property as a result of the *machine's* application of an element of chance." App., *infra*, 9a. The court considered it dispositive that winners and losers are determined by the sequence of pull-tabs on the preprinted paper roll inserted into the machine. *Ibid.* The court acknowledged that, if winners and losers were instead determined by a computer

inside the Lucky Tab II, an otherwise identical machine could qualify as a Johnson Act gambling device. *Ibid.* Contrary to the court of appeals' view, the reach of the Johnson Act does not turn on arbitrary distinctions as to whether winners and losers are determined by a fixed component of a device alone or instead through the operation of its fixed components with a removable component such as the paper roll here.

A. Lucky Tab II Satisfies The Statutory Requirements For Classification As A Gambling Device

As noted above, the Johnson Act defines a "gambling device" to include:

> any * * * machine or mechanical device (including, but not limited to, roulette wheels and similar devices) designed and manufactured primarily for use in connection with gambling, and * * * (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property.

15 U.S.C. 1171(a)(2).

The Lucky Tab II machine falls squarely within that definition. Lucky Tab II is "designed and manufactured primarily for use in connection with gambling," and the court of appeals did not suggest otherwise. A player becomes "entitled to receive * * * money or property" when the machine dispenses a winning pull-tab, which the player can then redeem for money. Whether the machine dispenses a winning pull-tab to a given player turns on various "element[s] of chance," including the number and order of winning and losing pull-tabs on the paper roll within the machine, the number of times previous players have played the machine, and the number of times the current player chooses to play. Indeed, it is these characteristics that

render the machine a gambling device from the player's perspective, as well as from the casino operator's perspective.

Section 1171(a)(2)(B) does not require that the "element of chance" be "appli[ed]" in any particular manner to determine whether a player wins or loses. It thus does not require, as the court of appeals perceived, that winners and losers be selected "as a result of the *machine's* application of an element of chance." App., *infra*, 9a. In particular, Section 1171(a)(2)(B) does not require that winners and losers be determined through the operation of a permanent component of the device (such as a computer) standing alone, rather than in conjunction with a removable component (such as a roll of paper pull-tabs).

Perhaps, if the phrase "as the result of the application of an element of chance" were rewritten and relocated so as to modify "machine" or "operation of [the machine]," Section 1171(a)(2)(B) might be understood as requiring the machine itself or its operation to apply the element of chance. Even then, however, the definition would be satisfied, because once the pull-tab roll is inserted into the Lucky Tab II machine, it is integral to both the machine and its operation. See App., *infra*, 5a ("Without a roll of paper pull-tabs in place, the [Lucky Tab II] machine cannot function—it will not accept money or display any symbols."). But whatever the proper interpretation of that hypothetical statute, the phrase "as the result of the application of an element of chance" in Section 1171(a)(2)(B), as written, modifies the phrase "may become entitled to receive," the clause that it immediately follows, not "machine" or "operation of [the machine]." See *Barnhart* v. *Thomas*, No. 02-763, slip op. 6-7 (Nov. 12, 2003) (discussing the rule of the last antecedent). As ex-

plained above, there is no question that there is an "element of chance" in whether a player of Lucky Tab II "become[s] entitled" to receive money.

Any requirement that winners and losers be determined solely by the mechanical features of the device would be inconsistent with the statutory example of "roulette wheels and similar devices." 15 U.S.C. 1171(a)(2). A roulette wheel, in and of itself, does not generate the numbers that determine whether a player has won or lost a game of roulette. Rather, those numbers are produced only with the addition of the external components of a roulette ball and an operator who spins the roulette wheel.

B. Construing The Johnson Act, Consistent With Its Broad Definition, To Encompass Devices Such as Lucky Tab II Advances The Act's Purposes

When Congress amended the Johnson Act in 1962 to add the definition of gambling device at issue here, Congress intended to reach *all* machines designed and manufactured for use in gambling that enabled players to win money or property through an element of chance, without drawing fine distinctions about how those devices operate.

As explained in the House Report, eleven years of experience under the Johnson Act had demonstrated the inadequacy of the existing gambling device definition, which was confined to traditional slot machines, "an essential part of which is a drum or reel," and to machines that "operate by means of insertion of a coin, token, or similar object." H.R. Rep. No. 1828, 87th Cong., 2d Sess. 5-6 (1962). The Committee noted that "[n]ew gambling machines have been developed which are controlled by syndicated crime, but which are not subject to the provisions of the Johnson Act because

they are not coin-operated, do not pay off directly or indirectly, and do not have a drum or reel as in the conventional slot machine." *Id.* at 6. In particular, the Committee noted the introduction of a species of pinball machine, not covered by the existing definition, that enabled a player to earn numerous free games that could be redeemed for money. *Ibid.*

Attorney General Kennedy, in congressional testimony in support of the 1962 amendment to the Johnson Act, also emphasized the need for a comprehensive definition of gambling device that manufacturers could not circumvent:

> If you specify according to how they are operating now, they will, in my judgment, within a year think of new ways to operate which would not be covered by the [Johnson Act]. I think the provision against machines made primarily for use in connection with gambling, with the burden of proof on the Government, will allow us to cover not only pinball machines, primarily used for gambling, but also to cover different kinds of machines that might be devised later.

Hearings on H.R. 3024, H.R. 8410 and S. 1658 Before the House Comm. on Interstate and Foreign Commerce, 87th Cong., 2d Sess. 22 (1962).

In response to such concerns, the House Report explained that the 1962 legislation would "broaden[] the definition of the term 'gambling device'" to reach pinball machines and other machines designed for gambling that "when operated may deliver as a result of the application of the element of chance any money or property, either directly or indirectly." H.R. Rep. No. 1828, *supra*, at 7. As the D.C. Circuit contemporaneously observed, therefore, Section 1171(a)(2)'s expan-

sive definition of gambling device "proceeded from a conscious purpose on the part of Congress to anticipate the ingeniousness of gambling machine designers." *Lion Mfg. Corp.* v. *Kennedy*, 330 F.2d 833, 837 (D.C. Cir. 1964).

Consistent with that purpose, the language of Section 1171(a)(2) serves to ensure that the Johnson Act, while comprehensive in the field that it regulates, reaches only *gambling* devices, not other types of machines that accept or dispense money or property. The requirements that the machine be "designed and manufactured primarily for use in connection with gambling" and that a player receive, or become entitled to receive, money or property "as the result of the application of an element of chance" distinguish gambling devices subject to the Johnson Act from both (1) change-making or vending machines, in which the user enters into a transaction that entitles him to receive money or property of comparable value to that which he has deposited, and (2) machines that enable a person to receive money or property as a result not of chance, but of his skill in playing a game, such as "a coin-operated bowling alley, shuffleboard, marble machine (a so-called pinball machine), or mechanical gun," 15 U.S.C. 1178(2).

It would be inconsistent with the congressional purpose underlying Section 1171(a)(2) to conclude that Lucky Tab II machines are not gambling devices based on distinctions that are not suggested, much less compelled, by the statutory text. Those machines are indisputably designed and manufactured primarily for use in gambling, and they indisputably entitle a winning player to receive money as the result of the application of an element of chance. Nothing more is required to

satisfy the definition of a gambling device under Section 1171(a)(2)(B).[1]

II. THE NINTH CIRCUIT HAS HELD, CONTRARY TO THE EIGHTH CIRCUIT HERE, THAT THE JOHNSON ACT APPLIES TO DEVICES SIMILAR TO LUCKY TAB II

The Eighth Circuit's holding that Lucky Tab II is not a Johnson Act gambling device cannot be reconciled with the Ninth Circuit's holding in *United States* v. *Wilson*, 475 F.2d 108 (1973) (per curiam), aff'g 355 F. Supp. 1394 (D. Mont. 1971). In *Wilson*, the court of appeals upheld the application of the Johnson Act to a device that was similar in relevant respects to Lucky Tab II.

The "Bonanza" machine in *Wilson*, much like the Lucky Tab II machine, incorporated into its design a removable roll of paper coupons of varying values. Before inserting a coin into the machine, the player could view the next coupon to be dispensed. After that

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[1] The Eighth Circuit also stated that Lucky Tab II could not qualify as a gambling device under Section 1171(a)(2)(A) because the device itself does not dispense money or property directly to a winning player. See App., *infra*, 8a; 15 U.S.C. 1171(a)(2)(A) (defining gambling device as, *inter alia*, a machine that "when operated may deliver, as the result of the application of an element of chance, any money or property"). The Eighth Circuit was mistaken, because a winning pull-tab, when dispensed by a Lucky Tab II machine, constitutes property. In any event, Section 1171(a)(2)(B), the provision discussed in the text, requires only that a winning player become "entitled to receive" money or property, not that the machine itself deliver that money or property. See H.R. Rep. No. 1828, *supra*, at 6 (observing that the expanded definition of gambling device in 15 U.S.C. 1171(a)(2) applies to devices that "deliver * * * any money or property, either directly or indirectly").

coupon was dispensed, the next coupon was exposed, and the player could decide whether to insert another coin. A player could redeem a winning coupon at the establishment where the machine was located. See 355 F. Supp. at 1396.

The question on appeal was whether a winning player of the Bonanza machine became entitled to money or property through the operation of an "element of chance" even though he could see the coupon that would be dispensed to him. The Ninth Circuit answered that question in the affirmative. The court explained that "most players put their first 25 cents in the 'Bonanza' machine because of the 'element of chance' that the next coupon, thus exposed, would entitle them, for another 25 cents, to a guaranteed payment of 50 cents to $31.00." 475 F.2d at 109. It is thus evident in the Ninth Circuit's holding that the "element of chance" in the playing of the Bonanza machine could arise in significant part from the order of coupons on the paper roll.[2]

In the Ninth Circuit, therefore, the Johnson Act would apply to a machine, such as Bonanza or Lucky

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[2] The Ninth Circuit in *Wilson* also affirmed the district court's determination that the Johnson Act's definition of gambling device was satisfied by a "bead ball" machine. See 475 F.2d at 109. That machine dispensed plastic beads, each of which contained a piece of paper bearing a combination of numbers. A player would insert a coin into the machine, turn a handle on the machine until a ball was dispensed, open the ball to retrieve the paper, and compare the number with a list of winning numbers posted on the machine. If the player received a winning number, he would be paid by the establishment where the machine was located. See 355 F. Supp. at 1395. Whether a player won or lost was determined not by the mechanical operation of the machine, but by preprinted paper inside each bead and by the order in which the beads were dispensed.

Tab II, that enables a player to gamble on whether the next item (*e.g.*, coupon, ticket, or pull-tab) that a machine dispenses from a preprinted paper roll will be a winner. In the Eighth Circuit, the Johnson Act would not apply to such a machine. That disagreement warrants this Court's resolution.

III. THE QUESTION WHETHER THE JOHNSON ACT CAN BE CIRCUMVENTED BY DEVICES SUCH AS LUCKY TAB II IS IMPORTANT BOTH INSIDE AND OUTSIDE INDIAN COUNTRY

The question whether machines such as Lucky Tab II satisfy the Johnson Act's definition of "any gambling device" has important ramifications outside as well as inside Indian country. As noted above, the Johnson Act prohibits the manufacture, sale, transportation, possession, or use of gambling devices not only within Indian country, but also within the District of Columbia, federal enclaves, and federal possessions. See 15 U.S.C. 1175(a). It also prohibits the interstate shipment of gambling devices to and from places in which they are prohibited under local law. See 15 U.S.C. 1172(a).

If, therefore, the Johnson Act were understood not to apply to devices such as Lucky Tab II, such devices could be introduced not only into additional areas of Indian country, but also into the other areas of federal jurisdiction identified in Section 1175(a). Moreover, although the possession or use of such devices might be prohibited under a State's own laws, the United States would be unable to prosecute the shipment of the devices into the State under Section 1172(a). As a result, the important role that Congress intended for the Johnson Act in reinforcing state prohibitions of gambling devices would be thwarted. See H.R. Rep. No. 1828, *supra*, at 6 (noting the Johnson Act's purpose of

"assist[ing] the States to enforce their laws and to combat organized crime").

The ramifications of the technical and narrow definition of a Johnson Act gambling device applied by the Eighth Circuit would not necessarily be confined to devices similar in design to Lucky Tab II. If, as the Eighth Circuit's reasoning suggests, a gambling device must deliver the element of chance through the operation of an internal electronic or mechanical component, "the ingeniousness of gambling machine designers," *Lion Mfg. Corp.*, 330 F.2d at 837, could be expected to produce an array of devices that deliver the element of chance through other means. Plainly, then, the court of appeals' holding that the Johnson Act does not apply to devices such as Lucky Tab II threatens to undermine the effectiveness of the Johnson Act both inside and outside Indian country.[3]

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[3] For the reasons stated in the government's certiorari petition in *Seneca-Cayuga Tribe* (at 21-22 n.7), there is no occasion in this case to decide whether the Lucky Tab II device could qualify as a "technologic aid" within IGRA's definition of Class II gaming in 25 U.S.C. 2703(7)(A) standing alone, because the use of that device is, in any event, prohibited by the Johnson Act.

CONCLUSION

The petition for a writ of certiorari should be granted and the case should be consolidated for argument with *Ashcroft* v. *Seneca-Cayuga Tribe of Oklahoma*, in which the government is also filing a petition for certiorari.

Respectfully submitted.

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NOVEMBER 2003

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-1503

UNITED STATES OF AMERICA, APPELLANT,

v.

SANTEE SIOUX TRIBE OF NEBRASKA, A FEDERALLY RECOGNIZED INDIAN TRIBE, APPELLEE.

Submitted: October 9, 2002

[Filed: March 20, 2003]

ORDER

Before: MURPHY, BEAM, and MELLOY, Circuit Judges.

BEAM, Circuit Judge.

The government appeals from the district court's[1] order granting the Santee Sioux Tribe (the Tribe) relief from a prior order of contempt. We affirm.

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[1] The Honorable Joseph F. Bataillon, United States District Judge for the District of Nebraska.

I. BACKGROUND

This is our third review of this case, which has an extensive factual and procedural history. In early 1993, the Tribe attempted to negotiate a compact with the State of Nebraska that would have permitted class III gaming on tribal lands, pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* (IGRA). No agreement was reached, but the Tribe nevertheless opened a class III gambling casino on the reservation in 1996. Thereafter, the Chairman of the National Indian Gaming Commission (NIGC) issued a closure order against the Tribe because the Tribe was illegally participating in class III gaming activities. The Chairman ordered the casino to close by May 5, 1996, and the Tribe complied with that order. However, on June 28, 1996, the Tribe reopened its casino.

The government then filed suit in federal court, alleging violations of federal and state law and requesting closure of the casino. The district court dismissed both the Tribe's and the government's request for injunctive relief. We reversed on appeal, holding that the Tribe had violated the IGRA by conducting class III gaming in contravention of Nebraska law and that injunctive relief was warranted. *United States* v. *Santee Sioux Tribe of Neb.*, 135 F.3d 558, 564-65 (8th Cir. 1998) (*Santee I*).

On remand, the district court ordered removal of all class III gaming devices. Soon after, the Tribe voted to continue operating the casino, including the class III devices, and the government sought an order of contempt. The district court found the Tribe in contempt, and by November 1999, the district court had reduced to judgment accrued fines totaling in excess of

$1 million. However, the district court determined that members of the Tribal Council could not be individually liable for contempt fines and that certain bank accounts could not be garnished. On appeal, we reversed the district court's decision not to hold the individual members of the Council in contempt and also reversed the district court's determination that certain monies could not be garnished. *United States* v. *Santee Sioux Tribe of Neb.*, 254 F.3d 728, 735-37 (8th Cir. 2001) (*Santee II*). Other findings by the district court relating to garnishment were affirmed, and the case was remanded. *Id.* at 735, 738.

In May 2001, the Tribe ceased operation of its class III gaming devices. It eventually replaced them with what is commonly known as "Lucky Tab II" machines, in part because the NIGC's Chief of Staff wrote a letter to the Tribe's legal counsel suggesting that the Tribe install and operate the Lucky Tab II dispensers. The NIGC thereafter dissolved its closure order because it took the position that the Lucky Tab II is not a class III gaming device. Accordingly, the Tribe brought this action, seeking relief from the prior order of contempt. The government, however, contends that the Lucky Tab II is a class III device, or, in the alternative, that even if it is a class II device, it is prohibited by the Johnson Act, 15 U.S.C. § 1171 *et seq.*

At trial, the following evidence was adduced regarding the Lucky Tab II machines. First, the instruments look and sound very much like traditional slot machines. Internally, the device is essentially a computer. It also has a manual feed for money, a roll of paper pull-tabs, a bar code reader to read the back of each pull-tab, a rubber roller to dispense the pull-tabs, a cutter which

cuts the pull-tabs from the roll, and a cash drawer. The bar code reader reads the pull-tab as it passes through the machine to the player, and based on this reading, a video screen displays the contents of the pull-tab—whether it is a winner or loser. The machine also emits different sounds, depending on whether it has read a winning or losing ticket.

A player begins playing by feeding money into the machine, but the machine cannot give change. The player presses a start button and after approximately two and a half seconds an animated display appears, announcing winner or loser status. The machine then dispenses the paper pull-tab to the player. At this point, the player can either pull back the paper tab to verify the contents, or continue playing by feeding more money into the machine and pressing the start button again. If the pull-tab is a winner, the machine cannot pay the player or give credits for accumulated wins; instead, the machine tells the player to go to the cashier and present the pull-tab to redeem winnings.

The pull-tabs themselves are small, preprinted, two-ply paper cards. The player peels off the top layer to reveal symbols and patterns which indicate a winning or losing card. The pull-tabs also indicate the number manufactured, game type, and unique sequence number. The back of the pull-tab shows an encrypted bar code with fifteen characters. The bar code must be scanned with a laser light to determine if the card is a winner or a loser. Because the information is encrypted, the data on the bar code is unknowable without the proprietary software from the manufacturer, World Gaming Technologies. Also, anti-tampering devices ensure that a pull-tab that has already been

scanned will be rejected and that the tabs will be dispensed in the correct sequence. Without a roll of paper pull-tabs in place, the machine cannot function — it will not accept money or display any symbols.

The evidence suggested that, as a practical matter, players often take the winning tickets, unopened, to the cashier for redemption. Furthermore, players frequently leave the losing tickets, unopened, in the dispenser drawer of the Lucky Tab II machines.

The district court found that the machines at issue were class II devices because: the machines do not determine the winner or loser, pull-tabs can be played without these machines, the player does not play against the machine, and no winnings are paid or accumulated by the machines. The district court followed the reasoning in *Diamond Game Enters., Inc.* v. *Reno*, 230 F.3d 365 (D.C. Cir. 2000), in coming to this conclusion. *United States* v. *Santee Sioux Tribe of Neb.*, 174 F. Supp.2d 1001, 1008-09 (D. Neb. 2001).

II. DISCUSSION

In reviewing a district court's final judgment following a bench trial, we review factual findings for clear error and legal conclusions de novo. Fed. R. Civ. P. 52(a); *Tadlock* v. *Powell*, 291 F.3d 541, 546 (8th Cir. 2002). A district court's choice between two permissible views of evidence will not be clearly erroneous, and we must give weight to the district court's opportunity to judge the credibility of the witnesses. *Estate of Davis* v. *Delo*, 115 F.3d 1388, 1393-94 (8th Cir. 1997).

The first issue in this case necessitates our delving into the relationship between the IGRA and the Johnson Act. The government argues that if Lucky Tab II is construed to be a class II gaming device, it is still a "gambling device" within the parameters of the Johnson Act[2] and therefore prohibited. If that is the case, the Tribe cannot be granted relief from the contempt order. The Tribe argues that the Johnson Act defines "gambling device" so expansively that it would include any device which is "electric" or "mechanical," including those which are allowable class II gaming devices. Because class II gaming is permitted under one federal law (the IGRA), but the machines which facilitate class II gaming are arguably prohibited under another (the Johnson Act), the Tribe argues that the IGRA has repealed the Johnson Act by implication.

The IGRA, in section 2710(b)(1)(A), states that an Indian tribe may engage in class II gaming where the state in which it is located permits similar games "and such gaming is not otherwise specifically prohibited on Indian lands by Federal law." 25 U.S.C. § 2710(b)(1)(A). This section, the government argues,

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[2] The Johnson Act defines "gambling device" to include all slot machines with a drum or reel with insignia, 15 U.S.C. § 1171(a)(1),

> and also: any other machine or mechanical device . . . designed and manufactured primarily for use in connection with gambling, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property.

15 U.S.C. § 1171(a)(2).

shows that the two acts can be read together because the IGRA contemplated prohibition of certain class II games if the devices used to carry out the gaming are prohibited Johnson Act gambling devices.

We agree with the government that the two acts can be read together. First, it is well-established that repeals by implication are not favored. *Morton* v. *Mancari*, 417 U.S. 535, 549, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974). "In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Id.* at 550. The two statutes here are not irreconcilable. Section 2710(b)(1)(A) clearly states that class II devices may be regulated by another federal statute — obviously the Johnson Act. Thus, the argument that the IGRA implicitly repeals the Johnson Act with respect to class II devices is not well taken, even though some version of this view has been expressed by several courts. See, e.g., *United States* v. *162 MegaMania Gambling Devices*, 231 F.3d 713, 725 (10th Cir. 2000) (noting that the IGRA indicates Congress did not intend to allow the Johnson Act to reach class II devices); *Diamond Game*, 230 F.3d at 367 (finding that the IGRA limits "the Johnson Act prohibition to devices that are neither Class II games approved by the commission nor Class III games covered by tribal-state compacts"). But see *Cabazon Band of Mission Indians* v. *Nat'l Indian Gaming Comm'n*, 14 F.3d 633, 635 n. 3 (D.C. Cir. 1994) (noting that besides express repeal of Johnson Act for class III gaming in IGRA section 2710(d)(6), "'[t]here is no other repeal of the Johnson Act, either expressed or by implication,'" for class III gaming) (quoting *Cabazon Band Mission Indians* v. *Nat'l Indian Gam-*

ing Comm'n, 827 F.Supp. 26, 31 (D.D.C. 1993)). We find that the IGRA and the Johnson Act can be read together, are not irreconcilable, and the Tribe must not violate either act if it is to gain relief from the prior order of contempt.

The government argues that if the Johnson Act applies, the Lucky Tab II machines are prohibited "gambling devices" under that act, and the Tribe is still operating gambling equipment in contravention of federal law. We disagree because we do not believe the Lucky Tab II machines are "gambling devices" within the meaning of the Johnson Act. Lucky Tab II machines are not slot machines as apparently contemplated by 15 U.S.C. § 1171(a)(1), because they do not randomly generate patterns displayed on a screen, pay out money or otherwise determine the outcome of a game of chance. Nor do these machines fall within the strictures of sections 1171(a)(2)(A) and (B), which state, as earlier indicated, that a gambling device includes any machine:

> designed and manufactured primarily for use in connection with gambling, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property.

15 U.S.C. § 1171(a)(2)(A), (B).

Lucky Tab II machines clearly do not fall within subsection A because the machines do not deliver any money or property. Subsection B seems a more likely candidate to ensnare these machines, but upon close

examination, we find it does not. This section states that the operation of a machine designed and manufactured primarily for gambling use is a gambling device if, "**as the result of the application of an element of chance**" a person can be entitled to receive money or property. 15 U.S.C. § 1171(a)(2)(B) (emphasis added). The key words are highlighted, and demonstrate why the Lucky Tab II devices do not fit within this definition. As the trial testimony indicates, these machines do not generate random patterns with an element of chance. They simply distribute the pull-tab tickets and display the contents of the tickets on a screen for the user. The user of the machine does not become entitled to receive money or property as a result of the *machine's* application of an element of chance, which is what the statute clearly contemplates. *See id.* ("by the operation of [the gambling device] a person may become entitled to receive, as the result of the application of an element of chance [by the machine], any money or property").

The Johnson Act does not bar this type of machine, because it is merely a high-tech dispenser of pull-tabs. If, however, the Lucky Tab II machines were computer-generated versions of the game of pull-tabs itself, or perhaps, even if it randomly chose which pull-tab from the roll it would dispense, it could fall within this subsection. However, it is clear the machines do neither of these things. Instead, they dispense, in identical order from the roll as physically placed in the machine, pull-tabs from that roll. The machines, as noted, have a cutting device which separate the tabs from the roll, and then feed the pull-tab to the player. This action does not describe the "application of the element of chance." Therefore, although we find that

the IGRA does not repeal the Johnson Act, either explicitly or implicitly, we also find that the Tribe does not violate the Johnson Act by operating the Lucky Tab II machines.

However, this does not end the inquiry. Instead, the key question becomes whether Lucky Tab II is an IGRA-prohibited class III gaming device. We begin with the language of the law. The statute offers the following explanations of class II and class III gaming:

> **(7)(A)** The term "class II gaming" means-(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)—
>
> > **(I)** which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,
> >
> > **(II)** in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and
> >
> > **(III)** in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards,
>
> including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo . . . .
>
> **(B)** The term "class II gaming" does not include — (i) any banking card games, including

> baccarat, chemin de fer, or blackjack (21), or (ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.
>
> . . .
>
> **(8)** The term "class III gaming" means all forms of gaming that are not class I gaming or class II gaming.

25 U.S.C. § 2703(7), (8).

According to the statute, then, pull-tabs is a class II game. However, "electronic or electromechanical facsimiles of any game of chance" are not class II games. Such facsimiles constitute class III gaming. *Id.* The government argues that Lucky Tab II machines *are* electromechanical facsimiles of the game of pull-tabs, making their use prohibited class III gaming. The Tribe argues that these machines are technological "aids" within the meaning of section 2703(7)(A), and therefore fall within the parameters of permitted class II gaming. We do not fully agree with either of these positions, and in that regard, we pause to clarify a terminology issue.

Other courts have construed this statute and concluded that the phrase "whether or not electronic, computer, or other technologic aids are used in connection therewith" modifies both the game of bingo and also other games mentioned later in the section, specifically "pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo." These courts thus have found that games other than bingo could be technologically aided. *E.g.*, *Diamond Game*, 230 F.3d at 367 (noting that pull-tabs is a class II game by

statute, and that the IGRA specifically allows use of technologic aids "in connection with class II games"). We disagree with this reading of the statute. Instead, we believe that the phrase "whether or not electronic, computer, or other technologic aids are used in connection therewith" applies only to bingo. See 25 U.S.C. § 2703(7)(A). However, we also note that nothing in the statute *proscribes* the use of technological aids for any games, so long as the resulting exercise falls short of being a facsimile. Therefore, while we quarrel somewhat with the posture in which the parties, and other cases, have placed the issues, we agree with the ultimate conclusion that if the devices are not facsimiles within the meaning of the statute, they are not prohibited, regardless of whether or not they are labeled technological "aids." With that caveat, we apply the "aids" and "facsimiles" terminology.

The District of Columbia Circuit recently considered whether the same Lucky Tab II machines at issue here were permitted class II gaming devices under the IGRA. The court distinguished the Lucky Tab II machines from the machines at issue in that circuit's earlier decision, *Cabazon Band*, 14 F.3d 633. In *Cabazon Band*, the court examined electronic pull-tab machines which randomly selected a card for the player, electronically "pulled" the tab off the card at the player's direction, and displayed the results onscreen. Because that game "exactly replicate[d]" the game of video pull-tabs in computer form, it was a facsimile and not a class II device. *Id.* at 636.

The *Diamond Game* court observed that the Lucky Tab II machines were "quite different" from the

machines in *Cabazon*, 230 F.3d at 369. The court found that the presence of the video monitor did not render Lucky Tab II a computerized version of pull-tabs because the computer did not select the patterns; instead, the machines merely cut tabs from paper rolls, displayed and dispensed them. "In other words, the game is in the paper rolls, not, as in the case of the *Cabazon* machine, in a computer." *Id.* at 370. Furthermore, citing Webster's Dictionary for a definition of aid, the court found that the machines "'help[ed] or support[ed]' or 'assist[ed]' the paper game of pull-tabs." *Id.* (citing *Webster's Third New International Dictionary* 44 (1993)). Noting that a Lucky Tab II machine was "little more than a high-tech dealer," the *Diamond Game* court held that "Lucky Tab II is not a facsimile of paper pull-tabs, it *is* paper pull-tabs." 230 F.3d at 370 (emphasis in original).

The prior law of this case is also instructive on this question. In *Santee I*, the Tribe argued that the State of Nebraska, through its SLOTS keno reading system, was already conducting class III gaming. We rejected that argument and held that the SLOTS keno reading system was a class II gaming device because "[t]he 'SLOTS' device is only a means of allowing keno players to *view keno results*, and, unlike a slot machine, is not a means of conducting the game itself. *See* Opinion of Nebraska Attorney General at 11 (Sept. 18, 1995)." *Santee I*, 135 F.3d at 564 (emphasis added). The Nebraska Attorney General's opinion referred to by *Santee I* describes the SLOTS system as follows:

> This device allows players to view game results by pressing one or more buttons on a video display terminal. The game results are displayed in slot-

> machine like fashion with the use of symbols (cherries, bars, etc.) rather than the typical number display. In approving use of the system, the Department . . . concluded that the device merely displays the results of the game in a novel way and does not directly affect the outcome of the game.

Neb. Op. Att'y Gen. No. 95074, 1995 WL 551980, at *7 (Sept. 18, 1995) (internal quotations omitted).

The Lucky Tab II machines, much like the SLOTS system described in *Santee I*, "display[ ] the results of the game in a novel way and do[ ] not directly affect the outcome of the game." *Id.* While the Lucky Tab II machines read the pull-tab card for the player and display the results on screen in a novel way, the paper pull-tab card itself is the player's only path to winning. The machines have nothing to do with the outcome of the game.

The *Diamond Game* court used a similar analysis to reach its conclusion about the Lucky Tab II machines. The government had offered a device called a "Tab Force Validation System" as an example of a class II aid. Under this system, a player buys a pull-tab from a clerk, and instead of peeling off the top layer, inserts the pull-tab into a scanner which reads a bar code and displays the results on a video screen. The *Diamond Game* court could find no discernable difference between the two systems:

> Both devices electronically "read" paper pull-tabs and display their contents on a screen, and neither can "change the outcome of the game." Unlike the machine involved in *Cabazon*, neither contains an internal computer that generates the game. Rather,

> both machines facilitate the playing of paper pull-tabs. They are thus Class II aids.

230 F.3d at 370.

While this case presents a close call, we think the better view is that operation of the Lucky Tab II machines does not change the fundamental fact that the player receives a traditional paper pull-tab from a machine, and whether he or she decides to pull the tab or not, must present that card to the cashier to redeem winnings. We agree with the reasoning of the *Diamond Game* court that the machines do not replicate pull-tabs; rather, the player using the machines *is playing* pull-tabs.[3]

The most recent amendments to the NIGC-enacted regulations also support this conclusion. Prior to July 2002, the regulations defined facsimile with direct reference to the Johnson Act. The regulation in effect as of July 17, 2002, defines "facsimile" as

> a game played in an electronic or electromechanical format that replicates a game of chance by incorporating all of the characteristics of the game, except when, for bingo, lotto, and other games similar to bingo, the electronic or electromechanical format broadens participation by allowing multiple

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[3] We have considered, and rejected, the government's argument that the Lucky Tab II machines are facsimiles of slot machines. These machines may look and sound like slot machines, but they cannot make change, accumulate credits, or pay out winnings. Thus, they are not exact copies (the commonly understood definition of a facsimile, see *Cabazon Band*, 14 F.3d at 636) of a slot machine.

> players to play with or against each other rather than with or against a machine.

25 C.F.R. § 502.8 (July 17, 2002).[4]

Furthermore, the regulations effective July 17, 2002, define an "aid" as an electronic, computer, or other technologic device that assists the playing of a game. *Id.* § 502.7(a)(1). Significantly, the regulation gives the following examples of gaming aids, "*pull tab dispensers and/or readers*, telephones, cables, televisions, screens, satellites, bingo blowers, electronic player stations, or electronic cards for participants in bingo games." *Id.* § 502.7(c) (emphasis added).

The current regulations seem to expressly contemplate the use of Lucky Tab II pull-tab dispensers/readers, suggesting that the NIGC has now given its imprimatur to these types of machines. *Cf. Diamond Game*, 230 F.3d at 369 (noting at that time that the

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[4] Citation to these newly-amended regulations begs the question of whether they can be applied in this case, as application would arguably impose an impermissible retroactive effect. See *Criger* v. *Becton*, 902 F.2d 1348, 1351 (8th Cir. 1990) (stating general rule of non-retroactive application for administrative regulations without indications to the contrary). However, the regulations were merely *amended*, not newly promulgated, and do not operate retroactively because they do not attach "new legal consequences to events completed before . . . enactment," *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 270, 114 S. Ct. 1483, 128 L.Ed.2d 229 (1994). Instead, the current regulations merely clarify the relevant terms. In fact, it appears the regulations were amended to conform with the reasoning in the four cases that analyzed this issue prior to promulgation of the amended regulations — *162 MegaMania Gambling Devices*, 231 F.3d 713, *Diamond Game*, 230 F.3d 365; *United States* v. *103 Elec. Gambling Devices*, 223 F.3d 1091 (9th Cir.2000), and *Cabazon Band*, 14 F.3d 633.

NIGC took no official position on the Lucky Tab II's class of gaming). Based on our review of the record and of the case law, the NIGC's conclusion that Lucky Tab II is a permissible class II gaming device seems to be a reasonable interpretation of the IGRA. *Cf. Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) (holding that agency interpretation which is reasonable is entitled to deference).

III. CONCLUSION

Because we conclude that the Lucky Tab II machines are not prohibited Johnson Act gambling devices and are not prohibited "facsimiles" within the meaning of 25 U.S.C. § 2703(7), the Tribe is not conducting class III gaming in contravention of the federal court's prior order. We therefore affirm the judgment of the district court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

No. 8:96CV367

UNITED STATES OF AMERICA, PLAINTIFF,

v.

SANTEE SIOUX TRIBE OF NEBRASKA,
A FEDERALLY RECOGNIZED INDIAN TRIBE,
DEFENDANT

Dec. 7, 2001

MEMORANDUM AND ORDER

BATAILLON, District Judge.

INTRODUCTION

This matter is before the court following a hearing on the Santee Sioux Tribe's ("Tribe") request that this court lift the sanctions of civil contempt entered imposing fines on the Tribe for failure to comply with the court orders dated November 28, 1998, and June 25, 1999. The Tribe contends that because it has ceased operating all Class III gaming activities, it should no longer be held in contempt. The United States ("Government") opposes the motion contending that the

Tribe is still operating Class III gaming devices. The court received evidence from both parties, including testimony from expert witnesses. After careful consideration of the arguments of each party, review of the exhibits and testimony, and thoroughly researching the relevant case law, I conclude that the Tribe's motion for relief, Fling No. 271, should be granted.

BACKGROUND

This action has a long history. I will summarize those parts that are relevant and important to my decision here. In early 1993, the Tribe attempted to negotiate with the State of Nebraska to create a compact with the State that would permit Class III gaming on tribal lands, pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 ("IGRA") and 18 U.S.C. §§ 1166-1168. No compact was reached, but the Tribe nevertheless opened a Class III gaming casino on the reservation in early 1996. Thereafter, the Chairman of the National Indian Gaming Commission ("NIGC") issued a closure order against the Tribe for the reason that the Tribe was participating in Class III gaming activities in violation of the IGRA. The Chairman ordered that the casino be closed by May 5, 1996. The Tribe complied with that order.

The Tribe appealed the Chairman's order to the full Commission. On June 28, 1996, the Tribe reopened its casino. The Government then filed suit against the Tribe asking the court to declare that the Tribe was operating an illegal Class III gaming casino, alleging violations of federal and state law, and requesting closure of the casino.

The court initially dismissed both the Tribe's request for injunctive relief and the Government's request for injunctive relief. On appeal the Eighth Circuit reversed. *United States* v. *Santee Sioux Tribe of Nebraska*, 135 F.3d 558 (8th Cir. 1998). The court concluded that the Tribe had violated the IGRA by conducting a Class III gaming operation and further concluded that the district court erred in not issuing an injunction to prohibit the gambling operation.

On remand in November 1998, the district court ordered closure of all of the Class III gaming devices. The Tribe voted to continue operating the casino, and the Government moved for an order of contempt. Following a show cause hearing, the court found the Tribe in contempt and fined it $3,000.00 per day. In June 1999 the court increased the fines to $6,000.00 per day and entered judgment in the amount of $432,000.00, representing fines that had accrued to that date. In August 1999 and November 1999 the court determined that the individual members of the Tribe would not be held in contempt and that certain bank accounts could not be garnished. Thereafter, the Government garnished approximately $178,000.00 of the Tribe's money toward the judgment.

On appeal, the Eighth Circuit reversed the district court's decision not to hold the individual members of the Tribe in contempt and also reversed the district court's determination that certain monies in the bank account could not be garnished. *United States* v. *Santee Sioux Tribe of Nebraska*, 254 F.3d 728 (8th Cir. 2001). Other findings by the district court relating to garnishment were affirmed by the Eighth Circuit. *Id.* The

action was remanded. On September 20, 2000, this case was transferred to my docket. Filing No. 252.

On or about May 15, 2001, the Tribe ceased operation of its previous Class III gaming devices. It replaced the gaming devices with what is commonly known as "Lucky Tab II," in part because the evidence shows the NIGC's Chief of Staff wrote a letter to the Tribe's legal counsel suggesting that the Tribe install and operate the Lucky Tab II electronic pull-tab dispensers. Exhibit I. The NIGC thereafter dissolved its closure order. The NIGC takes the position that the Lucky Tab II is not a Class III gaming device. The Government, however, contends that the Lucky Tab II is a Class III gaming device.

On October 31, 2001, I held a hearing on the Tribe's motion. I received evidence and testimony, including testimony from expert witnesses. Thereafter, I allowed post-trial briefing by the Tribe concerning the patents set forth in Exhibits 112 and 113.[1]

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[1] The Government offered Exhibit 112, a certified copy of a patent allegedly relating to the devices in this case, and Exhibit 113, an internet copy of a patent allegedly related to the devices in this case. Both exhibits were received into evidence. However, since Exhibits 112 and 113 were not shared with counsel for the Tribe prior to this hearing, I allowed the Tribe to file a post-trial brief addressing the patent issues raised at the hearing. The Government argues that the language in both patents bolsters its contention that the Lucky Tab II is a game of chance intended to look like and to be a Class III gaming device. I am not convinced that Exhibit 112 is the correct patent for the Lucky Tab II in this case, nor am I sure that Exhibit 113 is a final copy of the patent in question. However, a thorough review of both Exhibits 112 and 113, if anything, supports the Tribe's view that the Lucky Tab II dispenser was considered to be a technologic aid to Class II

ANALYSIS

A. Statutes

1. IGRA

Congress enacted the IGRA in 1988 to regulate gambling activities on Indian lands. 25 U.S.C. § 2702. The IGRA divides gaming into three separate categories: Class I, Class II, and Class III. Class I gaming activities are regulated by Indian tribes and are social

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gaming. The language in the exhibit, relied on by the Government, actually states that the device enables a play of a Class II game, "since the player does not rely upon the apparatus to determine the outcome of any particular play." Exhibit 113 at 18. Further, the patent states: [E]ach player of the gaming apparatus, which [sic] playing this pull-tab game, will play against each other player, as opposed to the gaming apparatus itself. In a true Class III gaming apparatus, the player effectively plays against the apparatus in that some means associated with that apparatus will determine whether or not the player receives winning indicia. . . . In the present invention, the apparatus is actually passive, as opposed to active, and does not determine the fate or outcome of a particular game or play. Ex. 113 at 17. The patent also states that the Lucky Tab II dispenser does not actually control the outcome of the game. *Id.* at 18. Likewise, in Exhibit 112, the patent describes the invention as a Class II game with the entertainment and enjoyment of a Class III game. Exhibit 112 at 2 and 5. The summary of the invention describes the device as an "electronic dispenser" much like that of an electronic ticket dispenser. *Id.* at 3. Although some language in the patents discusses games of "chance" and the look of a Class III gaming device, my reading of Exhibits 112 and 113 indicates that the inventor intended that the Lucky Tab II device be a Class II gaming device. I agree with the Tribe that the Government relies on isolated comments from the exhibits to support its claims. Accordingly, I find that the patent Exhibits 112 and 113, even if relevant to this action, do not provide support for the Government's position.

games for minimal prizes. 25 U.S.C. § 2703(6) and § 2710(a)(1). Class I gaming activities are not at issue in this action. Class II gaming is defined as "the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) . . . including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo. . . ." 25 U.S.C. § 2703(7)(A). "Electronic or electromechanical facsimiles of any game of chance or slot machines of any kind" are excluded from the definition of Class II gaming devices. 25 U.S.C. § 2703(7)(B). The Government admits that the statute allows for use of an "electronic aid" in connection with a pull-tab machine. Class III gaming consists of "all forms of gaming that are not Class I or Class II gaming." 25 U.S.C. § 2703(8). The use of Class III gaming devices would require the Tribe to have a compact with the State of Nebraska. 25 U.S.C. § 2710(d)(1). Both the Government and the Tribe agree that no such compact exists.

The IGRA created the NIGC to establish rules and regulations in accordance with the statutory requirements. 25 U.S.C. §§ 2704, 2706(b)(10). The NIGC defines a permissible aid to a Class II device as "electronic, computer or other technologic aid" to Class II gaming as "a device such as computer, telephone, cable, television, satellite or bingo blower," that, when used: (a) "[i]s not a game of chance but merely assists a player or the playing of a game," and (b) "[i]s readily distinguishable from the playing of a game of chance on an electronic or electromechanical facsimile." 25 C.F.R. § 502.7.

The Government relies on the IGRA for its proposition that federal and state laws pertaining to gambling activities apply to Indian country to the same extent as they do elsewhere in a state. However, Class II gaming is expressly exempted from those provisions, unless there is a complete ban on gaming. 18 U.S.C. § 1166(c).

The Tribe contends that legislative history supports the use of technologic aids. The Senate Report accompanying the IGRA stated that "such technology would merely broaden the potential participation levels [in Class II gaming] and is readily distinguishable from the use of electronic facsimiles in which a single participant plays a game with or against a machine rather than with or against other players." Sen. Rep. No. 100-446 at 9, *reprinted in* 1988 U.S.C.C.A.N. 3079. The Senate Report further states:

> The Committee specifically rejects any inference that tribes should restrict Class II games to existing game sizes, levels of participation, or current technology. The Committee intends that tribes be given the opportunity to take advantage of modern methods of conducting Class II games and the language regarding technology is designed to provide maximum flexibility.

Id.

2 The Johnson Act

The Johnson Act governs the manufacture, sale, distribution and use of "gambling devices" on federal lands. 15 U.S.C. § 1171 *et seq.* The Johnson Act makes it unlawful to use gambling devices in Indian country. 15 U.S.C. § 1175(a). The Government contends that the

Act applies here because the Tribe is operating a gambling device. The Tribe argues that the Act does not apply because the Lucky Tab II is a Class II device, and therefore, not subject to the Johnson Act.

The Government relies on *Shoshone Bannock Tribes* v. *United States*, No. CV95-0153-E-BLW (D.Idaho September 10, 1996), for its position that the Lucky Tab II is a Class III device and an illegal Johnson Act gambling device. In this case the magistrate determined the Lucky Tab II game was a Johnson Act device, a facsimile of the traditional game of pull-tab, and, consequently, a Class III gaming device. The district court affirmed these findings. However, a majority of cases have concluded that the Johnson Act is inapplicable to these types of devices, and similar findings have been made in both the Ninth and Tenth Circuits. *United States* v. *162 MegaMania Gambling Devices*, 231 F.3d 713, 725 (10th Cir. 2000) (Johnson Act does not prohibit Class II video bingo games); and *United States* v. *103 Electronic Gambling Devices*, 223 F.3d 1091, 1101-02 (9th Cir. 2000) (same); *Cabazon Band of Mission Indians* v. *National Indian Gaming Comm'n*, 827 F.Supp. 26, 31-32 (D.D.C. 1993) ("Cabazon I"), aff'd, 14 F.3d 633 (D.C. Cir. 1994) ("Cabazon II") (Johnson Act not applicable to aids to gambling).

Further, the legislative history supports the Tribe's argument.

> The phrase "not otherwise prohibited by federal law" refers to gaming that utilizes mechanical devices as defined in 15 U.S.C. § 1175. That Section prohibits gambling devices on Indian lands but does not apply to devices used in connection with bingo and lotto. It is the Committee's intent that with the

> passage of this act no other federal statute, such as those listed below, will preclude the use of otherwise legal devices used solely in aid of or in conjunction with bingo or lotto or other such gaming on or off Indian lands. The committee specifically notes the following sections in connection with this paragraph: . . . . 15 U.S.C. § 1171-1178 [the Johnson Act].

Sen. Rep. No. 100-446 at 12, *reprinted in* 1988 U.S.C.C.A.N. at 3082.

I conclude that the Johnson Act is not applicable to Class II devices. It is clear that Congress intended to permit technological aids. Although the Government argues to the contrary, the clear weight of the case law shows that such argument has been rejected by a number of federal courts. See *United States* v. *162 MegaMania Gambling Devices*, 231 F.3d at 725; *United States* v. *103 Electronic Gambling Devices*, 223 F.3d at 1101-02; *Diamond Game* v. *Reno*, 230 F.3d 365, 367 (D.C. Cir. 2000) (*Diamond Game II*); *Cabazon II*, 14 F.3d at 635; *United States* v. *Burns*, 725 F.Supp. 116, 124 (N.D.N.Y. 1989); *Seneca Cayuga Tribe* v. *NIGC*, Case No. 00-CV-609 (N.D.Okla. Feb. 20, 2001). I too conclude that the Johnson Act applies to Class III devices but not to Class II devices. Any other construction would nullify the IGRA. The essential determination, then, is whether the Lucky Tab II is a Class II or Class III device.

B. Caselaw–Class II and Class III Gaming

The Tribe relies on the decision of the D.C. Circuit in *Diamond Game II* to support its argument that the Lucky Tab II is a Class II aid, rather than a Class III

device. The Government argued in that case that the Lucky Tab II device was a Class III gaming device. The court specifically found that Lucky Tab II aids in the game of pull-tabs. It further found that Lucky Tab II is not a "computerized version" of pull-tabs, but instead "the screen merely displays the contents of the paper pull-tab." *Diamond Game II*, 230 F.3d at 370. "It is, in other words, an aid to the game of pull-tabs." *Id.*[2]

The Government now argues that the *Diamond Game II* analysis is wrong, relying on cases that have determined that a pull-tab machine is a facsimile of a game of chance, and thus, a Class III gaming device. See *Cabazon I*, 827 F. Supp. at 32; *Sycuan Band of Mission Indians* v. *Roache*, 788 F.Supp. 1498 (S.D. Cal. 1992), aff'd, 54 F.3d 535 (9th Cir. 1994). The United States asserts that the test set forth in *Cabazon II* if applied to the Lucky Tab II shows it " 'preserves the fundamental characteristics' "of the traditional paper pull-tab game, and therefore, it is a Class III device under IGRA. *Cabazon II*, 14 F.3d at 636 (quoting *Sycuan Band of Mission Indians* v. *Roache*, 788 F.Supp. at 1498). The court further held in *Cabazon II* that the game was a video version that "falls within the core meaning of electronic facsimile." 14 F.3d at 636 (quoting *Cabazon I*, 827 F.Supp. at 32). Likewise, the court in *Sycuan Band* held that "the machines present the player with 'electronic facsimiles' of the pull-tab game." *Sycuan Band of Mission Indians* v. *Roaches*, 54 F.3d at 542. However, because none of the cases relied on by the Government addresses the Lucky Tab

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[2] The Government did not appeal those findings to the Supreme Court.

II device, the Tribe argues that they are not squarely on point.

The Tribe also contends that in a meeting on February 13, 2001, with the Tribe and legal counsel for the Tribe and the United States Attorney present, the Chairman of the NIGC advised and encouraged the Tribe to use the Lucky Tab II device. Further, on April 2, 2001, NIGC Richard Schiff, acting Chief of Staff, sent a letter to Conly J. Schulte, counsel for the Tribe, stating: "We encourage the Tribe to take advantage of the judicial sanction given to Lucky Tab II or to seek out other machines that are identical to the Lucky Tab II in all material respects." Roger Trudell, Chairman of Tribe, Decl., Ex. A. Since the NIGC is the federal agency charged with implementing the IGRA, the Tribe contends that this endorsement should have legal effect. In addition, Donald Louden, a previous vice-president of sales and marketing at Worldwide Game Technology, the manufacturer of Lucky Tab II, through his declaration testified that the Chairman of the NIGC considers Lucky Tab II to be Class II gaming devices, and that at least twelve Indian tribes in several states use these electronic pull-tab devices. Ex. B.

C. Evidence—Expert Testimony

The crucial issue in this case is whether the Lucky Tab II is a technological aid to the game of pull-tabs (Class II) or whether it is a facsimile of the game of pull-tabs (Class III). The Government argues in essence that putting a Class II pull-tab into a machine makes it a facsimile of a game of chance. Based on the case law I have reviewed and the evidence submitted to me, I disagree. The evidence shows that the Lucky Tab

II is not a completely self-contained game or a facsimile of a game of chance.

Barbara Ann Frederiksen testified as an expert for the Tribe. Ms. Frederiksen is a forensic software analyst. She has had significant specialized training, education, and experience in software analysis. She has had additional training and experience in bar coding scanning systems, and in particular worked on debugging, remediation, and programming. She is an expert in forensics, bar coding, and electromechanical devices.

Ms. Frederiksen testified at length about how the game of pull-tabs worked in this case. I will summarize her testimony because it weighs heavily in my decision in this case. Ms. Frederiksen testified that a player feeds money into the machine. No change is received. A start button is pressed and for approximately 2 _ seconds an animated display appears. A pull-tab then comes out, is read by a bar code reader, and the video screen shows the money won by the player. There is no way for the machine to pay the player or to give credits. The player must go to the cashier to redeem the ticket. The machine only displays the winnings. A player cannot accumulate wins. The participant must present each pull-tab to get his or her winnings. The machine tells the player that he must go to the cashier for winnings. A machine dispenser cannot function without the pull-tabs in it. It will not accept money, nor will it display any symbols.

In terms of the machine's internal operations, there is a manual feed, a roll of paper pull-tabs, a bar code reader, a rubber roller, a cutter, and a cash drawer. The bar code reader reads the ticket as it passes

through the machine. The machine gets a still image based on the bar code information. The computer chips do not determine win or loss. Only the back of the ticket determines the win or loss status. As the pull-tab leaves the machine, the bar code is read and an "image" is displayed on the screen. The image displayed depends on what is programmed into the bar code.

The pull-tabs themselves are preprinted. The pull-tabs indicate winners or losers, number manufactured, game type, and unique sequence number. The back of the pull-tab shows bar code information, which is an encrypted bar code with fifteen characters. The bar code must be scanned with a laser light to determine if there is a winner or a loser. The information is encrypted, so no one could figure out the result without the proprietary software from the manufacturer, World Gaming Technologies. Also, an anti-tampering device will reject a pull-tab that has already been read. In addition, the tabs must be dispensed in the correct sequence. The ticket always controls whether the player wins or loses, and the cashier is required to evaluate and read the pull-tab.

After describing the Lucky Tab II, Ms. Frederiksen offered her opinion that these devices are not facsimiles of a game of pull-tab. She further testified that these devices are, in her opinion, technological "aids" for the game.

On cross-examination Ms. Frederiksen testified that the sounds are different for a winning ticket versus a losing ticket. She further testified that each roll contained about 7,000 tickets and in a deal (defined as the total tickets in a particular batch) there would be

approximately 540,000, with a predetermined number of winners.

Jerome L. Simpson, Jr., testified as an expert for the Government. Mr. Simpson had worked for 25 years for the FBI and then went into the accounting field. While with the FBI, he worked in the racketeering and records analysis division, and in particular examined evidence relating to gambling. A number of his investigations involved video gambling machines and gaming casinos. He stated that he testified about the Lucky Tab II device in *Diamond Game Enterprises, Inc.* v. *Reno*, 9 F.Supp.2d 13 (D.D.C. 1998) (*Diamond Game I*) case, which was reversed by the Circuit in *Diamond Game II*. He has further testified that the Lucky Tab II is a Johnson Act device. However, he testified that he had never seen paper pull-tabs with bar-coded information before, and that he did no work with bar-code technology. Mr. Simpson testified that he observed players take the winning tickets, unopened, to the cashier for redemption. These players left the losing tickets, unopened, in the dispenser drawer.

He testified that these Lucky Tab II machines are very similar to slot machines. First, according to Mr. Simpson, the machines look alike in terms of size, video, lights, buttons, and illuminated buttons. They accept bills, have grids with similar symbols, make noises, and have similar payoffs. Players in both games can look at video screens to determine if they have won. Mr. Simpson thus concludes that the Lucky Tab II is a facsimile of a traditional slot machine.

On cross-examination Mr. Simpson admitted that he had no computer degree or training, was not published,

and that his qualifications on some issues were called into question by Judge Michael Burrage in the *Seneca-Cayuga Tribe* case, at least with respect to the Johnson Act testimony.

After reviewing all of the evidence and relevant law in this case, I find that the Lucky Tab II machine is a technological aid to the game of pull- tabs, and thus is a Class II device. I base this conclusion on the following findings. First, the video does not determine the winner or loser. The player must pull the tab and take it to the cashier for validation. Second, theoretically, the game could be played without the machine. Third, no cash prizes are dispensed by the machine. Fourth, no credits are accumulated or prizes awarded by the machine. Fifth, the machine only dispenses paper pull-tabs. Sixth, there is no random generation performed by the machine. Seventh, the aid adds to the entertainment value. Eighth, the use of the machines in theory facilitates greater participation, since more participants are able to play at the same time. Ninth, these machines do not determine chance, and the player is not playing against the machine. Tenth, the machines are not an exact replica of pull-tabs. I found the testimony of Ms. Frederiksen and the *Diamond Game II* decision to be very persuasive in this regard.[3]

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[3] The Tribe argues that the *Diamond Game II* case requires the application of collateral estoppel in this case. The Government argues that collateral estoppel is not applicable, because this is a different tribe than the one in *Diamond Game II*. I need not decide this issue in view of my findings herein. I do note, however, that nonmutual collateral estoppel is not generally applied to the United States. See *United States* v. *Mendoza*, 464 U.S. 154, 158, 1

CONCLUSION

I find that Lucky Tab II is not an exact replica of the game of pull-tabs, and thus is not a facsimile of pull-tabs nor a Johnson Act device. I further find that Lucky Tab II is a Class II gaming device. In making this finding, I adopt the rationale set forth by the court in *Diamond Game II*. That court stated: "[T]he game played with the Lucky Tab II is not a facsimile of paper pull-tabs, it is paper pull-tabs." *Diamond Game II*, 230 F.3d at 370.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED THAT:

1. The Tribe's motion for relief, Filing No. 271, should be and hereby is granted; and

2. All fines against the Tribe are hereby permanently suspended effective May 15, 2001.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-1503

UNITED STATES OF AMERICA, APPELLANT

v.

SANTEE SIOUX TRIBE OF NEBRASKA, APPELLEE

June 25, 2003

ORDER DENYING PETITION FOR REHEARING AND FOR REHEARING EN BANC

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Theodore McMillian took no part in the consideration or decision of this matter.

APPENDIX D

1. Section 1171(a) of Title 15 provides:

As used in this chapter—

(a) The term "gambling device" means—

(1) any so-called "slot machine" or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or

(2) any other machine or mechanical device (including, but not limited to, roulette wheels and similar devices) designed and manufactured primarily for use in connection with gambling, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or

(3) any subassembly or essential part intended to be used in connection with any such machine or mechanical device, but which is not attached to any such machine or mechanical device as a constituent part.

* * * * *

2. Section 1172(a) of Title 15 provides:

It shall be unlawful knowingly to transport any gambling device to any place in a State or a possession of the United States from any place outside of such State or possession: *Provided*, That this section shall not apply to transportation of any gambling device to a place in any State which has enacted a law providing for the exemption of such State from the provisions of this section, or to a place in any subdivision of a State if the State in which such subdivision is located has enacted a law providing for the exemption of such subdivision from the provisions of this section, nor shall this section apply to any gambling device used or designed for use at and transported to licensed gambling establishments where betting is legal under applicable State laws: *Provided, further*, That it shall not be unlawful to transport in interstate or foreign commerce any gambling device into any State in which the transported gambling device is specifically enumerated as lawful in a statute of that State.

3. Section 1175(a) of Title 15 provides:

It shall be unlawful to manufacture, recondition, repair, sell, transport, possess, or use any gambling device in the District of Columbia, in any possession of the United States, within Indian country as defined in section 1151 of title 18 or within the special maritime and territorial jurisdiction of the United States as defined in section 7 of title 18, including on a vessel documented under chapter 121 of title 46 or documented under the laws of a foreign county.

4. Section 1178 of Title 15 provides:

None of the provisions of this chapter shall be construed to apply—

(1) to any machine or mechanical device designed and manufactured primarily for use at a racetrack in connection with parimutuel betting,

(2) to any machine or mechanical device, such as a coin-operated bowling alley, shuffleboard, marble machine (a so-called pinball machine), or mechanical gun, which is not designed and manufactured primarily for use in connection with gambling, and (A) which when operated does not deliver, as a result of the application of an element of chance, any money or property, or (B) by the operation of which a person may not become entitled to receive, as the result of the application of an element of chance, any money or property, or

(3) to any so-called claw, crane, or digger machine and similar devices which are not operated by coin, are actuated by a crank, and are designed and manufactured primarily for use at carnivals or county or State fairs.

5. Section 2703 of Title 25 provides, in pertinent part:

For purposes of this chapter—

* * * * *

(6) The term "class I gaming" means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.

(7)(A) The term "class II gaming" means—

(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)—

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards,

including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that—

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State,

but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

(B) The term "class II gaming" does not include—

(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or

(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

* * * * *

(8) The term "class III gaming" means all forms of gaming that are not class I gaming or class II gaming.

6. Section 2710 of Title 25 provides, is pertinent part:

(a) Jurisdiction over class I and class II gaming activity

(1) Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this chapter.

(2) Any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this chapter.

(b) Regulation of class II gaming activity; net revenue allocation; audits; contracts

(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if—

(A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and

(B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman.

A separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted.

* * * * *

(d) Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are—

(A) authorized by an ordinance or resolution that—

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

* * * * *

(3)

No. 03-762

Supreme Court, U.S.
FILED
JAN 2 6 2004
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In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

SANTEE SIOUX TRIBE OF NEBRASKA,
A FEDERALLY RECOGNIZED INDIAN TRIBE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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JURISDICTION

The Court of Appeals for the Eighth Circuit entered its judgment on March 20, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

A. Introduction

The Petition fails to satisfy any of the criteria traditionally employed by this Court for issuance of the writ. The Department of Justice (the "Department") asks this Court to engage only in correction of an alleged legal error: its sole question presented simply contests the Court of Appeals' application of the Johnson Act's definition of a gambling device to dispensers of paper pull-tabs. 15 U.S.C. 1171, *et seq.* This inquiry does not implicate any conflict in authority. Indeed, the only conflict here is an inter-agency one between the Department and the National Indian Gaming Commission (the "NIGC"), the federal agency that Congress has charged with regulating gaming activities on Indian lands. The NIGC has taken the view that Indian tribes that may lawfully sell pull-tabs may sell those same pull-tabs with the use of an electronic

dispenser, and its expert view underscores the stark shortcomings in the Department's claim of error. In fact, the NIGC encouraged Respondent Santee Sioux Tribe to install the very electronic pull-tab dispensers that the Department now claims are unlawful. This intramural squabble between two federal agencies is not the sort of dispute that this Court sits to resolve.

The Department's rote allegations about the significance of this case, moreover, are purely speculative in nature and likewise do not present a valid basis for issuance of the writ. The Department does not dispute that Congress has expressly authorized Indian tribes to sell "pull-tabs." Whether tribes may do so through the use of electronic dispensers is hardly the type of compelling federal issue that might warrant this Court's intervention even in the absence of a conflict in authority below. The Petition should be denied.

B. Factual Background

1. This case involves two federal statutes: the Johnson Act, 15 U.S.C. §§ 1171-1178, and the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721. First enacted in 1951, the Johnson Act prohibits the manufacture, sale, or use of "any gambling device" in federal territory, including Indian country. *See* 15 U.S.C. § 1175(a). The Johnson Act also prohibits the interstate transportation of any gambling device into or out of a state in which the device is banned. *See* 15 U.S.C. § 1172(a). The Johnson Act defines a "gambling device" to specifically include "slot machine[s]," *see* 15 U.S.C. § 1171(a)(1), "roulette wheels," and "any other machine or mechanical device * * * designed and manufactured

primarily for use in connection with gambling, and * * * by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property," 15 U.S.C. § 1171(a)(2).

For nearly four decades after the Johnson Act was enacted, there was no comprehensive federal scheme regulating gaming on Indian lands. Some states sought to regulate Indian gaming by exercising their delegated criminal jurisdiction over Indian lands. In 1987, however, this Court refused to allow California to apply a generally applicable statute regulating bingo to Indian gaming. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207-14 (1987).

With *Cabazon* providing the impetus, Congress passed IGRA a year later. Congress enacted IGRA with the express purpose of "provid[ing] a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1); *see City of Roseville*, 348 F.3d 1020, 1029 (CADC 2003). Congress specifically found that "existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands," 25 U.S.C. § 2701(3), and added that one of IGRA's purposes was "the *establishment* of federal standards for gaming on Indian lands," in order to "protect such gaming as a means of generating tribal revenue." 25 U.S.C. § 2702(3) (emphasis added). IGRA not only created standards for the regulation of Indian gaming, but also set up a new federal agency, the NIGC, to approve and oversee such gaming and to promulgate any necessary regulations and guidelines. *See* 25 U.S.C. §§ 2704-2708.

IGRA creates three classes of gaming. Class I gaming is defined to include social games played solely for small prizes and traditional forms of Indian gaming. *See* 25 U.S.C. § 2703(6). Class I gaming is regulated solely by Tribes, and is subject to neither federal nor state regulation. *See* 25 U.S.C. § 2710(a)(1).

Class II gaming comprises two categories of games. First, it includes "the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) * * * *including (if played in the same location) pull-tabs * * * and other games similar to bingo.*" 25 U.S.C. § 2703(7)(A)(i) (emphasis added). Second, it includes certain types of "non-banking" card games (in which players compete against each other). *See* 25 U.S.C. §§ 2703(7)(A)(ii), 2703(7)(B)(ii). Class II gaming is permissible if the state in which an Indian tribe is located "permits such gaming for any purpose by any person, organization or entity," and if "such gaming is not otherwise *specifically prohibited on Indian lands* by federal law." 25 U.S.C. § 2710(b)(1)(A) (emphasis added). Class II gaming is regulated by tribes, subject to approval and oversight by the NIGC. *See* 25 U.S.C. § 2710(b).

Class III gaming consists of all other forms of gaming, including roulette, slot machines, and "banking" card games such as blackjack and baccarat (in which players compete against the "house"). *See* 25 U.S.C. §§ 2703(7)(B)(ii), 2703(8). Class III gaming also covers "electronic or electromechanical facsimiles of any game of chance." 25 U.S.C. § 2703(7)(B)(ii). Class III gaming is permissible only if a tribe enters into a formal compact with the state in which it is located, and the compact is approved by the Secretary of the Interior. *See* 25 U.S.C. § 2710(d)(1).

IGRA gives the NIGC authority to "promulgate such regulations and guidelines as it deems appropriate to implement [IGRA's] provisions." 25 U.S.C. § 2706(b)(10). In 2002, after notice-and-comment rulemaking, the NIGC issued a regulation listing "pull tab dispensers and/or readers" as examples of permissible "technologic aids" to Class II gaming. 25 C.F.R. § 502.7.

2. Respondent Santee Sioux Tribe of Nebraska (hereinafter "Santee Sioux" or "Tribe") is a federally recognized Indian tribe whose reservation is located in rural north-central Nebraska, where employment and economic opportunities are sparse. The Santee Sioux suffer from a 74% unemployment rate and a chronic lack of funding for essential governmental programs. *See*, Resp't App. 2a-3a.

Shortly after the enactment of IGRA, the Santee Sioux sought, in accordance with the purposes animating the passage of the statute, to develop a gaming operation in order to strengthen its tribal government and to provide its members with the rarest of commodities in rural north-central Nebraska: employment. The Tribe requested that the State of Nebraska negotiate a compact for Class III gaming activities, as Congress had authorized under IGRA. *See* 25 U.S.C. § 2710(d). While the Tribe made good faith efforts over the course of the next several years to negotiate such an agreement, the State steadfastly refused to enter into any gaming compact. This was

despite the fact that the State of Nebraska permits a wide array of non-Indian gambling activities.[1]

As authorized by IGRA, *see* 25 U.S.C. § 2710(d)(7), the Tribe sued the State in an effort to force it to engage in good faith negotiations. However, in the wake of this Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the Tribe's suit was dismissed based on the State's Eleventh Amendment immunity. *Santee Sioux Tribe of Nebraska v. State of Nebraska*, 121 F.3d 427 (8th Cir. 1997). The Secretary of the Interior subsequently enacted regulations designed to remedy the impasse between tribes and states where states refuse to compact for Class III gaming and raise their Eleventh Amendment immunity as a barrier to suit. *Class III Gaming Procedures*, 25 C.F.R. § 291.1, *et seq.* The Santee Sioux promptly applied for these Class III Gaming Procedures, but after nearly five years, the Secretary of the Interior has yet to issue a decision on the Tribe's application.

[1] Such activities include online and electronic lotteries, Neb. Rev. Stat. § 9-801, *et seq.*; lotteries through the sale of pull-tabs (including the use of pull-tab dispensing devices), Neb. Rev. Stat. §§ 9-301, *et seq.*; video keno, Neb. Rev. Stat. §§ 9-601, *et seq.* (including online video keno) with devices that display results on a video screen "in a slot-machine like fashion with the use of symbols (cherries, bars, etc.)", Pet. App. 13a-14a (quoting Neb. Op. Atty. Gen. No. 95074); pari-mutuel horserace wagering (including simulcast and telephonic wagering), Neb. Rev. Stat. §§ 2-1201, *et seq.*; and bingo, Neb. Rev. Stat. §§ 9-201, *et seq.*

Meanwhile, after the Santee Sioux's largest non-governmental employer closed its doors in early 1996, the Tribe sought to replace some of the lost jobs by opening a very small gaming facility that offered approximately 30 Class III gaming devices, and employed approximately 12 tribal members who had families to support. Because the Tribe lacked a gaming compact with the State, the Chairman of the NIGC issued an order directing the Tribe to close its gaming facility. The Department of Justice thereafter filed this suit against the Tribe to enforce the NIGC order and close the facility. While the district court dismissed the suit, *United States v. Santee Sioux Tribe*, No. 8:96-367 (D. Neb. July 10, 1996) (unpublished) the Court of Appeals ultimately reversed. *U.S. v. Santee Sioux Tribe of Nebraska*, 135 F.3d 558 (8th Cir. 1998), *cert. denied*, 525 U.S. 813 (1998). The Department subsequently obtained a district court order holding the Tribe in contempt for its alleged failure to comply, and seized and garnished bank accounts held by the Tribe and its individual members as a means of enforcing the order. *United States v. Santee Sioux Tribe of Nebraska*, 254 F.3d 728 (8th Cir. 2001).

The Tribe then requested a meeting with the NIGC to determine, in the face of the State's intransigence and the Interior Department's inaction, what options remained available to it to realize, at least in some small part, IGRA's promise. The meeting, which took place in February of 2001, included the Chairman of the NIGC and the United States Attorney for the District of Nebraska. Resp't App. 5a-6a. At the meeting, the NIGC Chairman encouraged the Santee Sioux to operate a pull-tab game using electronic dispensers known as "Lucky Tab II" dispensers. *Id.* The D.C. Circuit had by then squarely held that these dispensers were lawful technologic aids for Class II gaming,

and that Indian tribes could accordingly operate these dispensers without a tribal-state compact. *Diamond Game Enterprises, Inc. v. Reno*, 230 F.3d 365, 369-70 (D.C. Cir. 2000).[2]

The NIGC Chairman's advice to the Tribe was repeated in March 2001, when the NIGC's Acting Chief of Staff wrote a letter to the Tribe's legal counsel in which he stated as follows:

> *We encourage the Tribe to take advantage of the judicial sanction given to Lucky Tab II* or to seek out other machines that are identical to the Lucky Tab II in all material respects. We will be glad to work with you to identify available alternatives.

Pet. App. 28a; Resp't App. 7a-8a, (emphasis added). Acting on this written and oral advice from the NIGC, the Santee Sioux acquired Lucky Tab II pull-tab dispensers and began selling pull-tabs using the dispensers.

As described by the courts below, the Lucky Tab II "is merely a high-tech dispenser of pull-tabs." Pet. App. 9a. Pull-tabs are preprinted, two-layer paper cards. In their traditional form, a player peels back the top layer and uncovers symbols that indicate a winning or losing card. Pet. App. 4a. With the Lucky Tab II, a roll of paper pull-tabs is loaded into a dispenser by a tribal attendant. When a player inserts money into the dispenser, it simply

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[2] The Department had argued in *Diamond Game Enterprises*, as it does here, that the Lucky Tab II is a prohibited "gambling device" under the Johnson Act. *See Diamond Game Enterprises, Inc. v. Reno*, 9 F.Supp.2d 13 (D.D.C. 1998).

scans the next pull-tab to be dispensed, dispenses the paper pull-tab to the player, then flashes an animated display depicting the contents of the pull-tab. *Id.* If a winning pull tab is dispensed, the player must still take it to a cashier for verification and to redeem any winnings. *Id.* The dispensers themselves do not disburse any cash, or accumulate credits for winning pull-tabs. Pet. App. 4a, 32a. And, unlike slot machines, the Lucky Tab II dispensers have nothing to do with determining winner or loser status – that comes simply from the pre-determined order of pull-tabs on the paper roll that is placed into the dispenser. Pet. App. 8a, 32a. "Lucky Tab II machines are not slot machines as apparently contemplated by 15 U.S.C. § 1171(a)(1) because they do not randomly generate patterns displayed on a screen, pay out money or otherwise determine the outcome of a game of chance." Pet. App. 8a.

After the Santee Sioux installed the pull-tab dispensers, the NIGC inspected the facility and dissolved the closure order that had been pending against the Tribe's gaming facility and that was the original basis for this lawsuit. Resp't App. 9a-11a. The NIGC predicated its action on its view "that the Lucky Tab II is not a class III gaming device." Pet. App. 21a. In June 2002, after an extensive notice-and-comment process, the NIGC embodied the legal basis for that view in formal regulations. *See* 25 C.F.R. 502.7(c); 67 Fed. Reg. 41166 (2002).

C. Proceedings Below

After receiving the NIGC's blessing for the installation of its Lucky Tab II machines, and after the NIGC dissolved its underlying closure order, the Santee Sioux moved the

district court for relief from its pending order holding the Tribe in contempt for operating Class III games without a tribal-state compact. Remarkably, the Department of Justice opposed the Tribe's motion. Contrary to (1) the NIGC's decision to dissolve the underlying closure order, (2) the express opinions and advice of the NIGC that had led the Santee Sioux to install the Lucky Tab II in the first place (and to the agency's subsequently promulgated regulations, which were published in final form while this case was pending on appeal), and (3) the decision of the D.C. Circuit in *Diamond Game Enterprises v. Reno*, 230 F.3d 365 (D.C. Cir. 2000), the Department argued that the Lucky Tab II dispensers were unlawful Class III gaming devices, and were further prohibited by the Johnson Act, 15 U.S.C. § 1171, *et seq.* The Department essentially claimed that the Tribe should be sanctioned for following the advice of the NIGC, the federal agency charged by Congress with regulating tribal gaming, and for adhering to the sole appellate court precedent on the issue. Pet. App. 19a.

The district court held an evidentiary hearing on the Tribe's motion for relief from contempt, and ruled in the Tribe's favor. Pet. App. 33a. The court first concluded that the proscriptions of the Johnson Act do not apply to technologic aids to Class II gaming under IGRA. Pet. App. 26a. After evaluating the extensive evidence presented to it regarding the nature of the Lucky Tab II dispenser, it then held that the dispenser is properly classified as a Class II aid, and granted the Tribe's motion for relief. Pet. App. 33a.

The Court of Appeals affirmed. Pet. App. 17a. Unlike the district court, and a number of other courts to have considered the issue, the court first held that the Johnson Act's proscription of "gambling devices" continues to apply

even to those technologic aids that fall with IGRA's definition of legal Class II gaming. That erroneous conclusion (which favored the government, and hence is not and could not be a subject of the petition), required the court to then pursue an avenue of inquiry that none of its sister courts have needed to undertake: whether the Lucky Tab II dispenser is a prohibited "gambling device" under the Johnson Act's definition of the term.

Although the court asked a different question, its answer returned it to the same place as its sister courts: an affirmation of the Tribe's right to use the Lucky Tab II. While the court stated that "the instruments look and sound very much like traditional slot machines," Pet. App. 3a, it went on to reject any notion that the Lucky Tab II dispensers in fact qualify as "slot machines" under the Johnson Act: "they do not randomly generate patterns displayed on a screen, pay out money or otherwise determine the outcome of a game of chance." Pet. App. 8a. The Department has not sought certiorari on that aspect of the Eighth Circuit decision.[3]

The court also rejected the government's argument that the Lucky Tab II dispensers satisfy the Johnson Act's alternative definition of a gambling device as a machine "by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property." 15 U.S.C. § 1171(a)(2)(B).

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[3] The government nonetheless continues to assert before this Court that the Lucky Tab II "looks like a slot machine, sounds like a slot machine, *and plays like a slot machine*," Pet. at 10 (emphasis added). That claim cannot be squared with the conclusion of the Court of Appeals, which tracked the findings of the district court. Pet. App. 14a-15a.

That is the only holding challenged by the present petition.

The court found this definition inapposite to the Lucky Tab II dispensers, as they do not apply an element of chance in their operation, but simply dispense pull-tabs in a pre-determined order – there being no question that, under IGRA, the Tribe is able to sell pull-tabs legally in a State like Nebraska (which, indeed, sells pull-tabs itself):

> As the trial testimony indicates, these machines do not generate random patterns with an element of chance. They simply distribute the pull-tab tickets and display the contents of the tickets on a screen for the user. The user of the machine does not become entitled to receive money or property as a result of the machine's application of an element of chance, which is what the statute clearly contemplates ... The Johnson Act does not bar this type of machine, because it is merely a high-tech dispenser of pull-tabs ... [The machines] dispense, in identical order from the roll as physically placed in the machine, pull-tabs from that roll. The machines, as noted, have a cutting device which separate the tabs from the roll, and then feed the pull-tab to the player. This action does not describe the "application of the element of chance."

Pet. App. 9a.

Finally, the court affirmed the district court's conclusion that the Lucky Tab II dispensers qualify as Class II gaming aids that the Tribe may properly operate under IGRA. Pet. App. 17a. The Department's petition does not challenge that conclusion (Pet. at 19 n.3), which accords with the NIGC's regulations, and the decisions of the D.C. Circuit in *Diamond Game Enterprises,* and the Tenth

Circuit in *Seneca-Cayuga v NIGC*, 327 F.3d 1019 (10th Cir. 2003), petition for cert. pending, No. 03-740.

REASONS FOR DENYING THE PETITION

A. The Petition Seeks Nothing More than Error Correction On An Issue Where the Holding Below Was Demonstrably Correct.

The Department of Justice raises only one question in its petition:

> The Johnson Act defines a gambling device to include "any machine or mechanical device" that is "designed and manufactured primarily for use in connection with gambling, and . . . by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property." 15 U.S.C. § 1171(a)(2).
>
> The question presented in this case is whether the Lucky Tab II machine is excluded from that definition because a player becomes entitled to receive money as a result of the sequence of winning and losing pull-tabs on a pre-printed paper roll inserted into the machine.

Pet. at (i).

To state the question is also to answer why it does not satisfy this Court's criteria for issuance of the writ. The Department of Justice simply seeks correction of what it claims to be the Court of Appeals' error in applying the Johnson Act's definition of a "gambling device" to the Lucky Tab II dispenser. The Department devotes the bulk of its argument to quarrelling with the Court of Appeals'

conclusion that, because the dispenser at issue does not itself apply an element of chance, it does not qualify as a gambling device under § 1171(a)(2) of the Johnson Act. *See* Pet. at 10-16. However, as the Solicitor General well knows, such a naked claim of error is not the stuff of certiorari.

Moreover, the Department's argument does not withstand scrutiny. While this is not the place for a full argument on the merits, even a brief discussion serves to underscore the flaws in the Department's position. Section 1171(a)(2) extends to those machines "by the operation of which a person may become entitled to receive, as the result of *the application of* an element of chance, any money or property." 15 U.S.C. § 1171(a)(2) (emphasis added). The Department would read the italicized language out of the statute. It claims that because an element of chance is involved in the game of pull-tabs, section 1171(a)(2) necessarily sweeps in any mechanical aid associated with that game. However, the emphasized language makes it clear that, in order for the definition to pertain, there must exist the application of an element of chance, and the only statutory referent that can potentially serve to effectuate such an application is a "device" or "machine." Hence, as the Court of Appeals correctly held, the sensible reading of the statute is that a machine must apply an element of chance in order for the Johnson Act definition to come into play.

The Department's contrary argument not only does violence to the language of section 1171(a)(2), but also would eviscerate IGRA's express authorization of "technologic aids" in connection with Class II gaming, 25 U.S.C. § 2703(7)(A)(i). All Class II gaming, of course, involves an element of chance, and thus all technologic aids to such

gaming (including the communications devices that the government claims, without explanation, are immune from its sweeping approach) enable individuals to receive money or property as the result of such chance. If this were all that were required, the technologic aid provisions of IGRA would be a dead letter, and so too would be Congress's clear intent that Class II gaming not be "restrict[ed] to existing game sizes, levels or participation, or current technology," but that tribes instead "be given the opportunity to take advantage of modern methods of conducting Class II games." Sen. Rep. No. 100-446, reprinted in 1988 U.S.C.C.A.N. 3071, at 3075 (Aug. 3, 1988).

The weakness of the Department's position is further underscored by the fact that the NIGC, the agency expressly charged by Congress to administer IGRA's provisions and oversee gaming in Indian country, does not share in it. As discussed above, the Santee Sioux first installed the Lucky Tab II dispensers at the urging of the NIGC, and the NIGC has since promulgated regulations (pursuant to notice and comment rulemaking) sanctioning the use by tribes of the Lucky Tab II as a Class II technological aid in Indian country. It is impossible for the Solicitor General to maintain a strong claim of error in the face of the expert agency's views to the contrary, and the fact that the government cannot present a unified position to the Court itself constitutes a compelling reason to deny the petition.

This case indeed began as the result of a closure order issued by the NIGC. Since the time of that order, the NIGC, in response to decisions from the Courts of Appeals, has made clear its view that Indian tribes may legally operate pull-tab dispensers in states, like Nebraska, that

allow for Class II gaming. *See* 25 C.F.R. § 502.7(c) (specifically including such machines within the definition of permissible technologic aids to Class II gaming); 67 Fed. Reg. 41166 (2002) (adopting new regulations, and explaining background and reasoning, including extensive public comment process and consultation with the Department of Justice).[4] The Santee Sioux, in turn, has transformed its gaming operation into one that relies on the pull-tab dispensers expressly approved – indeed specifically suggested – by the NIGC, which has led the NIGC to dissolve its closure order. In other words, the Tribe and the agency charged with the regulation of gaming in Indian country have arrived at a sensible consensus concerning the Tribe's gaming operations. The lower courts appropriately ratified that achievement by lifting the harsh sanctions that had been imposed on the Tribe and its officers during the earlier phases of these proceedings. There exists no warrant for intervention by this Court.

B. The Court of Appeals' Application of the Johnson Act Did Not Create A Conflict in Authority.

In an effort to salvage the Department's position, the Solicitor General tacks on to the end of the petition an argument that the Court of Appeals' application of the Johnson Act to the Lucky Tab II conflicts with a 30-year old, per curiam opinion of the Ninth Circuit concerning an entirely different type of machine. *See United States v.*

[4] In appropriating funds for the NIGC in 2003, Congress specifically adverted to these regulations, and "directed" the Commission to "consult with tribal governments" concerning them. H.R. Conf. ep. 108-10, 143 Cong. Red. H707, H1062 (daily ed. Feb. 12, 2003).

Wilson, 475 F.2d 108 (CA9 1973). But even a cursory review of the *Wilson* decision undermines any suggestion of a conflict in authority.

Wilson addressed a device known as the "Bonanza" machine. When individuals placed 25 cents into the machine, they were able to purchase a coupon, the value of which was already visible to them through a viewing window in the machine. They would also get the chance to view the next coupon, which they could then purchase for another 25 cents. *Wilson,* 475 F.2d at 108. The entire focus of both the majority opinion and the dissent in *Wilson* was "on whether playing a device that allowed the player to see what he was going to get before he deposited his money involved an 'element of chance.'" *Wilson*, 475 F.2d at 109. The majority concluded that it did, because in its view the user of the machine was really paying for the opportunity to view and purchase a subsequent, potentially more valuable, coupon.

Neither the majority nor the dissent in *Wilson* remotely addressed the conclusion reached by the Court of Appeals here: that a technologic aid like the Lucky Tab II that does not, by itself, supply an element of chance, but simply reads and dispenses *otherwise lawful* pull-tabs in a predetermined fashion, is not a gambling device under the Johnson Act (nor did the district court decision in that case, *see* 355 F.Supp. 1394 (D. Mont. 1971)). This may have been because the *Wilson* court proceeded on a premise that does not exist in this case: that any sale of chances to win a prize constituted illegal gambling. Unlike in *Wilson*, it is undisputed here that the sale of pull-tabs by the Tribe is a lawful activity in Nebraska, where the State itself sells such chances. Neb. Rev. Stat. §§ 9-301, *et seq.* Moreover, *Wilson* did not involve Indian country, and was decided

fourteen years before the enactment of IGRA. Under these circumstances, the Department's suggested conflict is entirely illusory.

More recent case law in the Ninth Circuit further undercuts the Department's allegation of a certworthy conflict. The Department's bald assertion that "in the Ninth Circuit . . . the Johnson Act would apply to a machine, such as . . . Lucky Tab II," Pet. at 17-18, simply ignores that court's decision in *United States v. 103 Electronic Gambling Devices*, 223 F.3d 1091 (9th Cir. 2000). There, the Ninth Circuit held that the prohibitions of the Johnson Act do not apply at all to Class II aids under IGRA. *Id.* at 1102. The Lucky Tab II and other Class II aids are therefore no more illegal in the Ninth Circuit than they are in the Eighth Circuit. Once again, then, the Department's allegation of a conflict does not withstand scrutiny.

C. The Department's Inflated Claims of Importance Do Not Warrant Issuance of the Writ.

As its final ground for granting the petition, the Department of Justice claims that the question of whether the Lucky Tab II dispenser is a "gambling device" under the Johnson Act may have important "ramifications outside as well as inside Indian Country." Pet. at 18. However, the Department's rote arguments about the potential effects of the decision below are purely speculative, and ignore the reality on the ground. As discussed above, the Court of Appeals' decision was hardly pathbreaking in its result. Over three years ago, the District of Columbia Court of Appeals rejected the Department's claim that Lucky Tab II dispensers are prohibited by the

Johnson Act, *see Diamond Game Enterprises v. Reno*, 230 F.3d 365 (D.C. Cir. 2000). Yet the Department has not cited to a single instance where that decision, let alone the decision below, has been applied outside of Indian Country, or where it has led to detrimental effects within Indian country.

At bottom, the decisions below and in *Diamond Game Enterprises* simply allow tribes that can already sell pull-tabs legally to do so with the aid of electronic dispensers, as the NIGC has specifically encouraged them to do. Nothing about that result remotely justifies review by this Court in the absence of any material conflict of authority in the lower courts.

D. The Existence of the Petition in No. 03-762 Should Not Affect the Disposition of the Petition In This Matter.

In No. 03-762, the Department has sought review of the Tenth Circuit's recent decision in *Seneca-Cayuga Tribe of Oklahoma v. NIGC*, 327 F.3d 1019 (10th Cir. 2003), that IGRA and the Johnson Act must be read together so as to preclude any interpretation of the latter that would forbid the use of the Class II technologic aids that IGRA expressly permits. For the reasons discussed in the Brief in Opposition in that case, that issue is not certworthy. Moreover, and of specific relevance here, that issue is not presented by the instant petition (the Department having prevailed on it below), and its existence should not have any effect on the disposition of the instant petition. For even if the Court were to grant certiorari on that question in *Seneca-Cayuga* and ultimately reverse, there would be no impact on the result below. There accordingly exists no warrant for holding this petition pending the outcome in *Seneca-Cayuga*.

In what is perhaps an attempt to bring the two cases closer together in this Court's view, the Department has also raised as a second question in *Seneca-Cayuga* the question presented for review here. But that question is no more certworthy in the context of *Seneca-Cayuga* than it is here. In fact, it is less so, as the Tenth Circuit had no occasion to pass on the issue. Hence, even if this Court were inclined to grant the petition on the Department's first question in *Seneca-Cayuga*, it should deny on the second and likewise deny the petition here.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted this 26 day of January, 2004.

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Counsel for Respondent
Santee Sioux Tribe of Nebraska

To: Mr. Butch Denny
Chairman
Santee Sioux Tribe of Nebraska
Respondent

Ref. No. CO-96-01

DECISION OF THE CHAIRMAN
ON EXPEDITED REVIEW

On April 25, 1996, the National Indian Gaming Commission (Commission) issued a Notice of Violation and an Order of Temporary Closure to the Santee Sioux of Niobrara, Nebraska (hereafter referred to as the "Respondent" or the "Tribe"). The Notice of Violation alleged that the Respondent had violated the Indian Gaming Regulatory Act and the regulations of the Commission by offering Class III video games in its casino. There is no compact between the Tribe and the State of Nebraska which authorizes the playing of such video games. The Temporary Closure Order directed the Respondent to cease all Class III gaming activities in its casino by 12 o'clock, noon, on May 1, 1996.

Following the issuance of these documents, the Respondent requested, both orally and in writing an informal, expedited review of this matter pursuant to Section 573.6(c) of the Commission's regulations. Such a review was conducted in the Commission's offices on Wednesday, May 1, 1996. The Respondent was represented by its Chairman and Vice-Chairman, numerous members of its tribal council, the manager of its casino and attorneys from the law firm of Peebles and Evans. At the review the Respondent presented a number of arguments and submitted a substantial number of documents in support of its request to rescind the closure order. At

the conclusion of the hearing, the Respondent requested that the date of the closure be extended to permit the Chairman to make his decision on the expedited review before the closure order became effective. That request was granted and on May 1, 1996, the Chairman issued a Revised Order of Temporary Closure extending the closure date until 12 o'clock, noon on May 3, 1996.

In accordance with Section 573.(c)(2) of the Commission's regulations, set forth below is the Chairman's decision with regard to the Respondent's request for expedited review.

I have determined that the closure order should not be rescinded. The basis for my decision is as follows:

1. The Respondent raised a number of arguments with regard to compact negotiations between the Tribe and the State of Nebraska. These arguments were supported by documents which raise serious concerns about the fairness of this process. Despite the equitable considerations raised by the Tribe, the fact remains that Commission does not have the authority to address issues related to process by which tribal-state compacts are negotiated. Under the Indian Gaming Regulatory Act it is the Secretary of the Interior who is responsible for approving tribal-state compacts. Accordingly, the arguments raised by the Tribe concerning compact negotiations with the State of Nebraska do not represent a basis for rescinding the closure order.

2. The Tribe made a highly persuasive presentation with regard to the importance of the jobs generated at the casino as a result of gaming and the critical needs being met by the gaming revenues. I fully recognize how significant these considerations are to a tribe which currently

has an unemployment rate of 74%. Unfortunately, despite the obvious good they are doing, the Casino revenues are being generated from Class III gaming activities which are not authorized by a tribal-state compact. Such activities constitute a substantial violation of the Commission's regulations which authorizes the issuance of a closure order. *See* Section 573.6(a)(11). The Respondent, should it choose to do so, will have an opportunity to attempt to assert these equitable arguments before the full Commission in the course of its appeal.

Given current circumstances in the State of Nebraska, I have no choice but to order the closure of the Class III gaming activity presently being conducted in the Respondent's casino. It is my hope that doing so will result in a change of circumstances which ultimately will permit Class III gaming activities to resume pursuant to a compact between the Tribe and the State of Nebraska.

Within 30 (thirty) days after service of the Revised Closure Order, the Respondent may appeal to the full Commission under 25 C.F.R. Part 577 by submitting a notice of appeal to the National Indian Gaming Commission, 1441 L Street, N.W., Ninth Floor, Washington, D.C. 20005. The Respondent has a right to assistance of counsel in such an appeal. A notice of appeal must reference the Revised Closure Order.

Date: May 2, 1996

/s/ Harold A. Monteau
Harold A. Monteau
Chairman
National Indian Gaming
Commission

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,:	)	Case No: 8:96CV367
Plaintiff,	)	DECLARATION OF ROGER TRUDELL
v.	)	
SANTEE SIOUX TRIBE OF NEBRASKA,	)	
Defendant.	)	

1. The information contained herein is based upon my personal knowledge, and I am competent to testify to the matters contained herein if called to do so in any proceeding.

2. I am the current Chairman of the Santee Sioux Tribe of Nebraska. I have also served as a Tribal Council member and business manager for the Santee Sioux Tribe.

3. I am familiar with the proceedings before the National Indian Gaming Commission captioned *In the Matter of Santee Sioux Tribe of Nebraska*, Docket No. NIGC 96-1 and CO-96-01. I am also familiar with the federal court litigation initiated by the United States against the Santee Sioux Tribe of Nebraska to enforce a closure order of the NIGC dated July 31, 1996, captioned *United States v. Santee Sioux Tribe of Nebraska*, Case No. 8:96 CV-00367 (D. Neb).

4. I am familiar with the gaming devices that were the subject of the NIGC's closure order of July 31, 1996. These same devices were the subject of the Federal

Court enforcement action captioned *United States v. Santee Sioux Tribe of Nebraska* noted above.

5. On May 15, 2001, the Santee Sioux Tribe of Nebraska ceased to operate and decommissioned the gaming devices that were the subject of the NIGC Chairman's May 2, 1996 Closure Order, and that were the subject of the November 24, 1999 Order of the Federal District Court in the *United States v. Santee Sioux Tribe of Nebraska*.

6. Attached hereto as Exhibit "A" is a true and correct copy of an April 2, 2001 letter received by the Tribe's legal counsel from Richard B. Schiff, acting Chief of Staff for the National Indian Gaming Commission. In said letter, NIGC describes that "Lucky Tab II", a machine that dispenses and reads paper pull-tabs, as found to be a Class II game by the United States Court of Appeals for the District of Columbia Circuit in *Diamond Game v. Reno*, 230 F. 3d. 365 (D.C. Circuit 2000). Mr. Schiff, on behalf of NIGC, states, "We encourage the Tribe to take advantage of the judicial sanction give to Lucky Tab II or to seek out other machines that are identical to the Lucky Tab II in all materials respects."

7. On or about February 13, 2001, pursuant to a request from a Tribe, a meeting was held between myself, members of the Tribal Council the Santee Sioux Tribe, and Chairman Montie Deer of the National Indian Gaming Commission ("NIGC"). Among others present was Tom Monaghan, U.S. Attorney for the District of Nebraska.

8. At the February 13, 2001 meeting, Chairman Deer encouraged the Santee Sioux Tribe to install and operate Class II gaming devices. Among the Class II

gaming devices recommended by Chairman Deer were the Lucky Tab II pull-tab dispensers. Mr. Deer represented that such pull-tab dispensers may be operated by the Tribe without a Tribal-State gaming compact. Mr. Monaghan did not disagree with Chairman Deer's Statements.

9. On May 15, 2001, the Santee Sioux Tribe, acting on the advice and recommendation of the NIGC Chairman and the acting Chief of Staff of the NIGC, removed and decommissioned its gaming devices that were the subject of the NIGC Closure Order and the federal court's enforcement actions in the *United States v. Santee Sioux Tribe*, and replaced said devices with Class II Lucky Tab pull-tab dispensers referenced in the April 2, 2001 letter from the NIGC.

10. The Lucky Tab pull-tab dispensers installed by the Santee Sioux Tribe at its gaming facility on May 15, 2001 are accurately depicted in the attached Exhibit B.

11. The Santee Sioux Tribe currently is not operating any Class III gaming devices nor does the Santee Sioux Tribe intend to operate any Class III gaming devices in the absence of a tribal-state compact authorizing the operation of said devices or procedures promulgated by the Secretary of the Interior authorizing the operation of Class II gaming.

12. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 31st day of May, 2001 at Lincoln, Nebraska.

By: /s/ Roger Trudell
Roger Trudell

NATIONAL INDIAN
[LOGO]
GAMING COMMISSION

Conly J. Schulte, Esq.
Monteau, Peebles & Crowell, L.L.P.
12100 West Center Road
Suite 202
Omaha, Nebraska 68144-3960

April 2, 2001

Dear Mr. Schulte:

Thank you for your letter of March 27, 2001, seeking the views of the National Indian Gaming Commission on the Cyberdyne Pull-Tab System. I am frankly encouraged by the prospect of the Tribe offering a class II machine at their casino, and am committed to helping them in this process.

Lucky Tab II, a machine that dispenses and reads paper pull-tabs, as found to be a class II game by the United States Court of Appeals for the District of Columbia Circuit in *Diamond Game v. Reno*, 230 F.3d 365 (D.C. Cir. 2000). The machine used in the Cyberdyne Pull-Tab System that you have described, however, has some characteristics that would make it legally distinguishable from the Lucky Tab II machine. In addition to other variations, the Cyberdyne machine internally prints a paper pull-tab from the electronic cartridge, while with the Lucky Tab II the paper pull-tabs were loaded into the machine.

Although the jurisprudence in this area is still developing, the Chairman of the NIGC has determined that he will not bring enforcement actions premised on the theory that Lucky Tab II is a class III machine. We are not prepared at this point to give similar treatment to a machine such as that

employed in the Cyberdyne Pull-Tab System that dispenses a pull-tab the machine has printed from an electronic cartridge. We encourage the Tribe to take advantage of the judicial sanction given to Lucky Tab II or to seek out other machines that are identical to the Lucky Tab II in all material respects. We will be glad to work with you to identify available alternatives.

Moreover, we are willing to undertake a detailed review of the Cyberdyne Pull-Tab system for purposes of an advisory classification opinion. Issuance of such an opinion, however, will require significantly more information and additional time for analysis. Certainly this is not a task that would be completed in time to meet your April 20, 2000, deadline, and, in any event, we see the matter of this game classification as distinct from the issue of how the case between the Santee Sioux Tribe of Nebraska and the United States might be settled. If you or the vendor are interested in submitting the game for such review, our point of contact is Staff Attorney Maria Getoff at (202) 632-7003.

Again, I appreciate your effort to assist the Tribe in resolving the current dispute with the United States government.

Sincerely,

/s/ Richard B. Schiff
Richard B. Schiff
Acting Chief of Staff

Cc: Paul Boeshart, Esq.
Assistant United States Attorney
215 N. 17th St., Rm. 7401
Omaha, NE 68101

National Indian Gaming Commission

In the Matter of	)	
Santee Sioux Tribe	)	CO-96-01
of Nebraska	)	

ORDER

Pending before the National Indian Gaming Commission (Commission) is a motion filed on May 15, 2001, by the Santee Sioux Tribe of Nebraska (Tribe) to dissolve the closure order that the Commission issued on July 31, 1996. The basis for the Tribe's motion is its assertion that it has decommissioned and removed the video poker and video blackjack gambling devices that formed the basis of the closure order. For the reasons set forth below, the Commission grants the motion in part and rescinds the final Closure Order dated July 31, 1996.

BACKGROUND

On April 25, 1996, then-Chairman Harold Monteau of the National Indian Gaming Commission (NIGC) issued a Notice of Violation to the Tribe for operating Class III video poker and video black-jack devices without a tribal-state compact and, thus, in violation of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721 (2001).

On May 1, 1996, Chairman Monteau followed the Notice of Violation by ordering the Tribe to close its gaming casino. (*See* Revised Order of Temporary Closure, Ref. No. CO-96-01, May 1, 1996.) And on May 2, 1996, after expedited review proceedings pursuant to 25 C.F.R. § 573.6(c), Chairman Monteau refused to lift the closure

order. (*See* Decision of the Chairman on Expedited Review, Ref. No. CO-96-01, May 2, 1996.)

The Tribe appealed the Chairman's action to the full commission. On July 31, 1996, the full Commission issued a lengthy opinion addressing numerous arguments raised by the Tribe and affirming and making permanent the Chairman's May 2, 1996, closure order.[1]

On May 15, 2001, the Tribe filed a motion to dissolve the Commission's permanent closure order. Attached was the Declaration of Roger Trudell, Chairman of the Tribe. In his declaration, Chairman Trudell alleges that on May 15, 2001, the Tribe ceased to operate the gaming devices that were the subject of the Commission's order and indicating that the Tribe has begun operating a court-sanctioned Class II gaming device.

FINDINGS

The Commission credits the assertions made by Chairman Trudell in the declaration attached to the Tribe's motion. Moreover, the Chairman of the NIGC directed Region Chief John Peterson of NIGC Region IV, located in St. Paul, Minnesota, to travel to the Santee Sioux Tribe's gaming operation in Nebraska to verify Chairman Trudell's assertions. Region Chief Peterson

[1] Pursuant to 25 U.S.C. § 2713(c), the Tribe appealed the Commission's decision in Federal district court. On November 4, 1999, the United States District Court for the District of Nebraska entered Judgment in favor of the NIGC, *Santee Sioux Tribe of Nebraska v. National Indian Gaming Commission*, 8:99CV205 (D. Neb. November 4, 1999.)

verified that the gaming devices that were the subject of the Commission's enforcement action are no longer present at the Tribe's gaming operation. (*See* Declaration of John Peterson, NIGC Region Chief, May 30, 2001). Based upon this evidence, the Commission hereby finds that the Tribe is no longer operating the illegal Class III gaming devices that were the subject of the NIGC closure order.

CONCLUSION AND ORDER

Nearly five years after the NIGC ordered closure of the Tribe's casino, and after extensive litigation between the Tribe and the United States, the Tribe has taken the corrective action ordered by the NIGC. Because the Tribe is longer operating the video poker and video black jack games that gave rise to this enforcement action, the Commission hereby GRANTS the Tribe's motion in part and ORDERS that Closure Order 96-01 be, and hereby is, RESCINDED to the extent that the Closure Order required closure of the Tribe's entire gaming operation. As to the particular video poker and video blackjack games that instigated the Commission's enforcement action, however, the Closure Order shall remain in effect until such time as such gaming becomes lawful whether through a tribal-state compact or alternative compact procedures approved by the Secretary of the Interior or other means.

IT IS SO ORDERED.[2]

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[2] This Order addresses only the issue before the Commission. In its ongoing litigation with the Department of Justice, the Tribe has several remaining issues, such as contempt of court penalties, that should must [sic] be addressed, if at all, by the appropriate court.

6/4/01
Date

/s/ Montie R. Deer
Montie R. Deer
Chairman

/s/ Elizabeth L. Homer
Elizabeth L. Homer
Vice-Chairman

/s/ Teresa E. Poust
Teresa E. Poust
Commission

Supreme Court, U.S.
FILED
FEB 13 2004
OFFICE OF THE CLERK

No. 03-762

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

SANTEE SIOUX TRIBE OF NEBRASKA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

THEODORE B. OLSON
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BEST AVAILABLE COPY

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In the Supreme Court of the United States

No. 03-762

UNITED STATES OF AMERICA, PETITIONER

v.

SANTEE SIOUX TRIBE OF NEBRASKA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The United States seeks review of the Eighth Circuit's holding in this case that the definition of "gambling device" in the Johnson Act, 15 U.S.C. 1171 *et seq.*, does not encompass machines, such as the one in this case, that incorporate into their operation a pre-printed paper roll containing symbols that determine whether a player has won or lost. As explained in the certiorari petition (at 16-18), the Eighth Circuit's ruling on this issue conflicts with a decision of the Ninth Circuit holding that a machine having the same features is a "gambling device" covered by the Johnson Act. Respondent offers no valid reason to conclude that the question presented here is not a significant one for the enforcement of federal gambling laws both inside and outside Indian country. Nor does respondent dispute that this case provides a suitable vehicle in which to resolve that question.

A. RESPONDENT FAILS TO DEMONSTRATE THAT THE IMPORTANT QUESTION OF STATUTORY CONSTRUCTION IN THIS CASE WAS CORRECTLY RESOLVED BELOW

Contrary to respondent's assertion, the question presented in this case involves not mere "[e]rror [c]orrection." Br. in Opp. 13. It instead involves a question of construction

of an important federal criminal statute, the Johnson Act—a question and a statute that have particular importance because of the widespread introduction of gaming into Indian country and the rapidly increasing use of devices like those at issue here in tribal gaming operations. See Pet. at 19-21, *Ashcroft* v. *Seneca-Cayuga Tribe*, No. 03-740 (filed Nov. 21, 2003); Amici Br. of States of California, et al., at 1-5, *Seneca-Cayuga Tribe*, *supra*. This Court frequently grants certiorari, even in the absence of a circuit conflict, in cases that "concern the construction of a major federal statute." *United States* v. *Donovan*, 429 U.S. 413, 422 (1977); see Robert L. Stern, et al., *Supreme Court Practice* 247-249 (8th ed. 2002). The Eighth Circuit understood the issue here to be one of statutory construction—*i.e.*, whether the definition of "gambling device" in 15 U.S.C. 1171(a)(2) is satisfied when the "element of chance" is supplied by a paper roll of pull-tabs installed within the machine. See Pet. App. 8a-10a.

Respondent, in fact, *conceded* in the courts below that the Lucky Tab II machine in this case satisfies the Johnson Act's "gambling device" definition, even though respondent now maintains that the Eighth Circuit correctly held otherwise. Compare Br. in Opp. 14-16, with Resp. C.A. Br. 36 n.17 (["T]he Tribe did not dispute [in the district court] that the Lucky Tab II dispenser fell within the * * * broad definition of a 'gambling device' under the Johnson Act."), and Gov't C.A. App. 200-201, 218-219.[1] Respondent's own

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[1] At the evidentiary hearing in the district court, respondent's counsel (who remains its counsel of record in this Court) engaged in the following exchange with the court:

> MR. SCHULTE: The issue is whether or not these devices are exempt from the Johnson Act. I don't believe we are disputing that they qualify under the definition of a Johnson Act device.
>
> THE COURT: So what you're saying is that these are Johnson Act devices, and the question really is whether these device are exempted under the Indian Gaming Act?
>
> MR. SCHULTE: That's correct, Your Honor.

prior position on the question undermines its current assertions that the court of appeals' construction of the Johnson Act is textually compelled. Nor does respondent point to anything in the Johnson Act's language or history that supports, much less requires, the court of appeals' unduly restrictive reading of the Act.

The Johnson Act defines a gambling device to include "any * * * machine or mechanical device [that is] designed and manufactured primarily for use in connection with gambling, and * * * by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property." 15 U.S.C. 1171(a)(2). As the United States previously explained (see Pet. 11-13), the Lucky Tab II machine satisfies that definition. Lucky Tab II is "designed and manufactured primarily for use in connection with gambling"—a point that has never been disputed either by respondent or by the courts below. A player becomes "entitled to receive * * * money or property" when the Lucky Tab II dispenses a winning pull-tab that can be redeemed for money. And, finally, whether the machine dispenses a winning pull-tab to a given player turns on the application of various "element[s] of chance," including the number and order of winning and losing pull-tabs on the paper roll within the machine, how many times previous players have played the machine, and the number of pull-tabs that the current player intends to buy.

Gov't C.A. App. 218-219; see *id.* at 200 (respondent's counsel acknowledges that the "gambling device" definition in the Johnson Act "would literally * * * apply to a box with a slot on it with a mechanical handle on it to dispense pull-tabs"). In its appellate brief, respondent similarly argued that the Indian Gaming Regulatory Act, 25 U.S.C. 2701 *et seq.*, has made the Johnson Act "irrelevant" to gambling devices that are used as purported Class II "technologic aids"—not that, if the Johnson Act *is* applicable to such devices, Lucky Tab II would not satisfy the Johnson Act's "gambling device" definition. See Resp. C.A. Br. 17, 36-37 n.17.

There is no merit to respondent's assertion that Section 1171(a)(2) cannot reach machines such as Lucky Tab II without reading the words "the application of" out of the statute. Br. in Opp. 14. Nothing in the statutory text requires that the "element of chance" be "appli[ed]" in any particular manner—for example, by a permanent component of a machine (such as a computer), as distinguished from a removable component (such as a roll of paper pull-tabs). Any such distinction would be entirely artificial because the paper pull-tab roll, once installed as an essential part of the Lucky Tab II, is as much a part of the machine's operation as would be, for example, a computer that determined winners and losers (and that could itself be removed and reprogrammed). See Pet. App. 5a (recognizing that Lucky Tab II "cannot function" without the "roll of paper pull-tabs in place"). Nor would such a distinction comport with Section 1171(a)(2)'s express application to "roulette wheels and similar devices" —which are incapable of applying any "element of chance" without the addition of a removable component, the roulette ball. Although the foregoing points are set forth in the certiorari petition to demonstrate how the court of appeals erred in its construction of Section 1171(a)(2), respondent does not even attempt to answer them. Respondent likewise does not explain how such a construction can be reconciled with Congress's purpose in enacting the Johnson Act's present "gambling device" definition "to anticipate the ingeniousness of gambling machine designers." *Lion Mfg. Corp.* v. *Kennedy*, 330 F.2d 833, 837 (D.C. Cir. 1964).

There is likewise no merit to respondent's assertion that Section 1171(a)(2) must be construed as the Eighth Circuit construed it so as not to "eviscerate IGRA's express authorization of 'technologic aids' in connection with Class II gaming." Br. in Opp. 14. That argument conflates the question on which the Eighth Circuit ruled against respondent—*i.e.*, that the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.*, does not provide an implied exemption from the

Johnson Act for Class II "technologic aids"—with the question presented here of the construction of the Johnson Act's "gambling device" definition. That second question turns on what the Eighty-Seventh Congress said and meant in enacting Section 1171(a)(2) in its present form, *not* on what the One Hundredth Congress that enacted IGRA might have thought Section 1171(a)(2) or other provisions of the Johnson Act to mean. In any event, construing Section 1171(a)(2), consistent with its text, purpose, and legislative history, to include devices such as Lucky Tab II leaves a wide array of Class II "technologic aids" outside the Johnson Act. Those include the very sorts of "technologic aids" discussed in the Senate Report on IGRA, such as "telephone, cable, television or satellite" equipment to "link[] participant players at various reservations." S. Rep. No. 446, 100th Cong., 2d Sess. 9 (1988); see Pet. 13, *Seneca-Cayuga Tribe*, *supra* (discussing that subject). Contrary to respondent's suggestion (Br. in Opp. 14-15), "aids" of that sort ordinarily would not satisfy the Johnson Act's "gambling device" definition, for the obvious reason that they ordinarily are not "designed and manufactured primarily for use in connection with gambling." 15 U.S.C. 1171(a)(2).

Respondent next errs in asserting that "the government cannot present a united position" on the question whether the Johnson Act's "gambling device" definition encompasses Lucky Tab II and similar machines. Br. in Opp. 15. The position expressed on that question in the certiorari petition (as well as in the government's submissions to the courts below) is the position of the United States. The same position has been expressed by the federal parties, which include the National Indian Gaming Commission (NIGC), in the parallel Tenth Circuit case, *Seneca-Cayuga Tribe* v. *NIGC*, 327 F.3d 1019 (2003). Moreover, while the NIGC has promulgated regulations classifying "pull tab dispensers and/or readers" as "technologic aids" to Class II gaming within the meaning of *IGRA*, 25 C.F.R. 502.7(c), the NIGC's regulations do not

address whether such machines are "gambling devices" under *the Johnson Act*. Nor does respondent identify any less formal determination by the NIGC that Lucky Tab II or similar machines do not satisfy the Johnson Act's definition of "gambling device." In any event, the NIGC does not have any authority to interpret or enforce the Johnson Act, which is not confined in its application to Indian country and is enforced by the Department of Justice.[2]

B. RESPONDENT CANNOT RECONCILE THE DISAGREEMENT BETWEEN THE EIGHTH AND NINTH CIRCUITS ON THE QUESTION PRESENTED HERE

As the certiorari petition explains (at 16-18), the Ninth Circuit has held that the Johnson Act's "gambling device" definition is satisfied by a machine that, like Lucky Tab II, dispenses pieces of paper, the contents of which determine whether the player has won or lost, from a removable preprinted paper roll. See *United States* v. *Wilson*, 475 F.2d 108 (9th Cir. 1973) (per curiam). An essential predicate of the Ninth Circuit's holding in *Wilson* is that the "element of chance" under Section 1171(a)(2) may be provided by the sequence of symbols on the paper roll. In this case, however,

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[2] Although respondent repeatedly alludes to advice that it received from NIGC personnel to replace the concededly by IGRA Class III devices in its casino with Lucky Tab II devices (*e.g.*, Br. in Opp. 7-9, 15-16), respondent omits to mention contrary advice that it subsequently received from the United States Attorney's Office not to install Lucky Tab II because it is a "gambling device" under the Johnson Act and a Class III device under IGRA. See Gov't C.A. App. 215 (Assistant United States Attorney states, without contradiction, at district court evidentiary hearing that "Mr. Schulte [respondent's counsel] knows full well that even though the commission had advised in that letter that they should initiate the operation [*i.e.*, the installation of Lucky Tab II], we provided to them oral notice that they shouldn't go forward."). In view of such advice, it was hardly "[r]emarkabl[e]," as respondent asserts (Br. in Opp. 10), that the United States took the position that respondent's installation of Lucky Tab II did not provide a basis for relief from the prior contempt order.

the Eighth Circuit held that the "element of chance" cannot be provided in that manner. The two decisions are consequently irreconcilable.

Respondent cannot meaningfully distinguish *Wilson* from the present case. Respondent asserts that *Wilson* "proceeded on [the] premise * * * that any sale of chances to win a prize constituted illegal gambling" under state law, whereas the traditional game of paper pull-tabs is legal under state law. Br. in Opp. 17. Nothing in *Wilson* supports that conclusion. To the extent that *Wilson* referred to state law at all, it was in the context of addressing whether several state court decisions construing *state* gambling statutes supported by analogy the court's construction of the term "element of chance" in the Johnson Act. And it did so for the purpose of resolving an issue, not presented here, whether an "element of chance" existed even though the Bonanza machine revealed to the player the content of the coupon that he would receive by inserting his coin. See 475 F.2d at 109. (The court of appeals concluded that the "element of chance" existed because the player would also be gambling on the content of the subsequent coupon. *Ibid.*) Moreover, even if respondent is correct that the traditional game of *paper* pull-tabs is lawful in Nebraska, that would be irrelevant to whether Lucky Tab II satisfies the Johnson Act's "gambling device" definition. That definition does not turn on whether a device might—through "the ingeniousness of gambling machine designers," *Lion Mfg. Corp.*, 330 F.2d at 837—incorporate some aspects of a game of chance that state law permits to be played *without* any mechanical means. Were it otherwise, a video poker machine presumably could not qualify as a gambling device, so long as state law allowed the playing of the traditional card game of poker for any stakes. Nor, presumably, could a roulette

wheel qualify as a gambling device, so long as state law allowed gambling on numbers drawn from a hat.[3]

Respondent further contends that, because the Ninth Circuit has held (contrary to the Eighth Circuit here) that IGRA provides an implied exemption from the Johnson Act for Class II "technologic aids" used at tribal casinos, there is no "certworthy conflict" between the decisions here and in *Wilson*. Br. in Opp. 18 (citing *United States* v. *103 Electronic Gambling Devices*, 223 F.3d 1091 (9th Cir. 2000)). In the first place, the Ninth Circuit's holding on the implied exemption question is incorrect, conflicts with the Eighth Circuit's decision in this case on that question, and independently warrants review and reversal by this Court for the reasons stated in the certiorari petition and reply brief in *Seneca-Cayuga*. And, in any event, respondent is incorrect that the consequence of that holding is that "Lucky Tab II and other Class II aids are * * * no more illegal in the Ninth Circuit than they are in the Eighth Circuit." Br. in Opp. 18. Even under *103 Electronic Gambling Devices*, devices such as Lucky Tab II and Bonanza are illegal in the Ninth Circuit in the various contexts in which the Johnson Act applies outside of Indian country. Under the Eighth Circuit's decision in this case, by contrast, such gambling devices have been rendered legal wherever the Johnson Act applies.

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[3] That is not to say that state law has no role in the application of the Johnson Act. The Johnson Act provision under which the defendant was prosecuted in *Wilson*, 15 U.S.C. 1172, provides an exemption for the interstate transportation of gambling devices to places where their use is permissible. No comparable exemption based on state law is contained in 15 U.S.C. 1175(a), which prohibits gambling devices in, *inter alia*, Indian country.

C. RESPONDENT PROVIDES NO VALID BASIS TO DISCOUNT THE IMPORTANCE OF THE QUESTION PRESENTED HERE

Because the Eighth Circuit's unduly constricted definition of "gambling device" extends to all contexts in which the Johnson Act applies, this case has significant ramifications both inside and outside Indian country. It threatens the United States' ability to regulate gambling devices in federal enclaves and possessions, see 15 U.S.C. 1175(a), as well as to assist States in preventing the shipment of gambling devices into their territory, see 15 U.S.C. 1172(a). See Pet. 18-19. The importance of the question is not diminished, as respondent suggests, merely because the Eighth Circuit's decision has not yet produced demonstrable "detrimental effects." Br. in Opp. 19. In view of the United States' position in this case and *Seneca-Cayuga* that Lucky Tab II and similar machines are "gambling devices" within the prohibitions of the Johnson Act, prudent persons could be expected to await the conclusion of these cases before taking action that could subject them to prosecution under that Act.[4]

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[4] Respondent is incorrect in stating that *Diamond Game Enterprises, Inc.* v. *Reno*, 230 F.3d 365 (D.C. Cir. 2000), "rejected the [government's] claim that Lucky Tab II dispensers are prohibited by the Johnson Act." Br. in Opp. 18-19. *Diamond Game* was solely concerned with the classification of Lucky Tab II under IGRA. The court of appeals' analysis turned on whether the device more closely resembled an "aid" to the traditional game of paper pull-tabs (and thus was a Class II device under IGRA) or a "facsimile" of that traditional game (and thus was a Class III device under IGRA). See 230 F.3d at 370; see also 25 U.S.C. 2703(7)(A)(i) (referring to Class II "aids"); 25 U.S.C. 2703(7)(B)(ii) (referring to Class III "facsimiles"). Although the NIGC's regulations at that time defined a Class III device as "any gambling device as defined in [the Johnson Act]," 25 C.F.R. 502.8 (1993), the court of appeals did not address whether Lucky Tab II satisfied the Johnson Act's "gambling device" definition or otherwise intimate that Lucky Tab II could permissibly be used outside the tribal gaming context.

The Eighth Circuit's decision, while independently significant for federal law enforcement, takes on added significance when considered with the Tenth Circuit's decision in *Seneca-Cayuga*. Both cases involve similar machines used at tribal gaming facilities. Both cases, as briefed and argued below, presented the questions (i) whether IGRA provides an implied exemption from the Johnson Act for "gambling devices" that are used as "technologic aids" to Class II games such as bingo and pull-tabs, and (ii) whether, if not, Lucky Tab II (or the similar Magical Irish game in *Seneca-Cayuga*) is a prohibited "gambling device" under the Johnson Act. The Tenth Circuit, having answered the first question in the affirmative (and thus contrary to the Eighth Circuit here), did not reach the second. In order comprehensively to resolve these questions, therefore, the Court should grant review in both cases and consolidate them for argument.

* * * * *

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted and the case should be consolidated for argument with *Ashcroft* v. *Seneca Cayuga Tribe*, No. 03-740.

Respectfully submitted.

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Solicitor General

FEBRUARY 2004

MOTION FILED
JAN 2 6 2004

(2)

No. 03-762

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

SANTEE SIOUX TRIBE OF NEBRASKA, A FEDERALLY RECOGNIZED INDIAN TRIBE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF; BRIEF OF *AMICUS CURIAE* CHOCTAW NATION OF OKLAHOMA IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Motion For Leave To File An *Amicus Curiae* Brief In Opposition to the Petition for a Writ of Certiorari

The Choctaw Nation of Oklahoma ("Tribe") hereby moves this Court for leave to file an *amicus curiae* brief opposing the petition for certiorari. *See* S. Ct. R. 37(2)(b). Counsel for respondent has not consented to the filing of the proposed *amicus* brief.

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INTEREST OF *AMICUS CURIAE*[1]

The Choctaw Nation of Oklahoma ("Tribe") believes the Eighth Circuit correctly held that the Lucky Tab II device is a Class II "technologic aid" under section 2703(7)(A)(i) of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-21, and is not an unlawful gambling device under the Johnson Act, 15 U.S.C. §§ 1171-1175. The Tribe has an interest in this case because revenues derived from operating Class II games are essential to the Tribe's ability to maintain its economic self-sufficiency and political self-determination.

The Tribe is a federally-recognized Indian Tribe located within the State of Oklahoma, with approximately 160,000 enrolled members. It operates Class II gaming to support essential tribal governmental services. The Tribe relies almost entirely upon revenues from Class II gaming to fund its education, health care, housing, real estate, financial, communications, community services, social services, and other essential governmental programs. Class II gaming revenues are used for tribal day-care and senior citizen programs, health care clinics, and a forty-bed hospital, the construction of which was funded entirely by Class II gaming revenues. In addition, Class II gaming revenues fund tribal educational programs and college scholarships for over 1,000 Choctaw youths. Those same revenues support the building and maintenance of

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[1] No counsel for a party authored this brief in whole or in part. No person or entity, other than the Tribe, its members or its counsel, made any monetary contribution to the preparation or submission of the brief. *See* S. Ct. R. 37(6).

tribal roads, law enforcement, water and waste-water systems, housing, and other governmental infrastructure systems and facilities. Finally, Class II gaming creates hundreds of jobs for local Indians and non-Indians.

The Choctaw Nation's government and economy rest on the revenue collected from its Class II gaming activities. Thus the Tribe has a sufficient interest here to warrant the Court's leave to file the following proposed *amicus* brief.

ARGUMENT

I. There is no conflict among the circuits regarding the interplay of IGRA and the Johnson Act, and this case does not raise that issue

The petition for certiorari in *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission*, 327 F.3d 1019 (10th Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3373 (Nov. 21, 2003) (No. 03-740), asks whether IGRA creates an implied exemption from the Johnson Act as to Class II gaming devices. The Department of Justice ("DOJ") – quite properly – did not ask the Court to resolve that issue in this case. First, the Eighth Circuit resolved this issue in the DOJ's favor, and thus the DOJ cannot seek review. Second, and most critically, any resolution of this question would not affect the outcome in this case. Even if the Court were to reverse the Tenth Circuit's holding in *Seneca-Cayuga Tribe* and hold that the Johnson Act analysis should have been more fully exercised there, the Eighth Circuit's outcome in this case would not change.

Even though the DOJ cannot and does not ask the Court to use this case as a vehicle to decide the IGRA/Johnson Act issue, the petition nonetheless asserts that the Eighth Circuit's holding on this point is in conflict with the Tenth Circuit's holding in *Seneca-Cayuga Tribe*. *See* Petition at 2. That assertion is incorrect; there is no such split. All of the circuit courts of appeals decisions reviewing the current generation of electromechanical pull-tab dispensers, such as the machine at issue here, have unanimously upheld their legality. In each case, the result has turned on specific factual findings regarding the nature of the game at issue.

Moreover, contrary to the government's claimed conflict among the circuits, the Eighth Circuit here and the Tenth Circuit in *Seneca-Cayuga* embraced the same analytical approach. Both courts harmonized the two relevant statutory schemes, IGRA and the Johnson Act, just as this Court has instructed the lower federal courts to do. "'When there are two acts on the same subject the rule is to give effect to both if possible.'" *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 432 n. 43, 92 S.Ct. 2247, 2273, n. 43 (1972) (*quoting United States v. Tynen*, 78 U.S. (11 Wall.) 88, 92, 20 L.Ed. 153 (1870)).

The practical, real-world result in all cases has been that electromechanical pull-tab dispensers are lawful aids to Class II games that may be used by tribal government gaming enterprises, assuming all of the other requirements of IGRA are met. A review of the cases reveals that the legal analysis leading to this result has, in each case, involved a sensible and successful effort to harmonize applicable provisions of IGRA and of the Johnson Act.

In this case, the Eighth Circuit affirmed the district court's finding (and the National Indian Gaming Commission's ("NIGC") conclusion) that the Lucky Tab II electromechanical pull-tab dispenser is a permissible Class II aid and not an unlawful "gambling device" under the Johnson Act. Consistent with the Tenth Circuit's analytical approach in *Seneca-Cayuga*, discussed below, the Eighth Circuit found "that the IGRA and the Johnson Act can be read together," *United States v. Santee Sioux Tribe of Nebraska*, 324 F.3d 607, 612 (8th Cir. 2003), and that "[t]he two statutes here are not irreconcilable." *Id.* at 611. The opinion does not rely on a "repeal by implication" analysis.

In *Seneca-Cayuga Tribe*, the Tenth Circuit reached the same conclusion using the same approach. The court there held that the electronic pull-tab dispenser at issue, the Magical Irish Instant Bingo Dispenser System, is a permissible Class II aid. *See id.* at 1044. The Tenth Circuit harmonized IGRA with the Johnson Act, adopting a construction that "gives meaning to both statutes." *Id.* at 1032. The court properly declined to "ascribe to Congress the intent both to carefully craft through IGRA this protection offered to users of Class II technologic aids and to simultaneously eviscerate those protections by exposing users of Class II technologic aids to Johnson Act liability for the very conduct authorized by IGRA." *Id.* The court concluded that "Congress specifically and affirmatively authorized the use of Class II technologic aids, subject to compliance with the other IGRA provisions that govern Class II gaming." *Id.*

The government argued in *Seneca-Cayuga* that, to adopt the tribes' construction of the two statutes, the court "must first find an implied partial repeal of the Johnson

Act by IGRA, a construction of statutes disfavored unless there is some affirmative showing of [congressional] intention to repeal." *Id.* at 1035 (internal quotations omitted). But the court disagreed: "our task, as we have explained, is to read the Johnson Act and IGRA together giving each Congress's enacted text the greatest continuing effect." *Id.* Indeed, the court expressly found that its harmonizing "construction gives meaning to both statutes. . . . " *Id.* at 1032. Simply put, the court did not use the "repeal by implication" analysis in adjudicating the case. Its analytical approach was entirely consistent with that of the Eighth Circuit in the instant case.

Moreover, the same analysis, harmonizing the two statutory schemes, has led to the same results in the three other recent Class II cases. First, in *U.S. v. 162 MegaMania Gambling Devices*, 231 F. 3d 713 (10th Cir. 2000), just as in *Seneca-Cayuga* and *Santee Sioux*, the court found that the Johnson Act and IGRA "are not inconsistent" and may be construed together. *Id.* at 725. The opinion does not rely on a "repeal by implication" analysis. The court held that MegaMania, an electronic bingo aid, "is not a gambling device as contemplated by either Act, but rather an electronic aid to bingo or a game similar to bingo," *id.* at 725 (internal quotations omitted), in part because "winners must defeat other players, not a machine." *Id.* at 721. The court concluded that MegaMania "is a Class II game under the Indian Gaming Regulatory Act, and its machines are not illegal gambling devices operated in violation of the Johnson Act." *Id.* at 726.

Similarly, in *Diamond Game Enterprises, Inc. v. Reno*, 230 F.3d 365 (D.C. Cir. 2000), the court held that the same Lucky Tab II eletromechanical paper pull-tab dispenser at issue here is a permissible Class II aid. *See id.* at 366. The

opinion does not rely on a "repeal by implication" analysis, nor does it even reveal that the government raised the Johnson Act question on appeal. The opinion cites with approval *Cabazon Band of Mission Indians v. National Indian Gaming Commission*, 14 F.3d 633, 635 n. 3 (D.C. Cir. 1994), "noting that IGRA repealed the Johnson Act with regard to Class III devices subject to a tribal-state compact but that there is no other repeal of the Johnson Act in IGRA, implying that Class II aids, permitted under IGRA, do not run afoul of the Johnson Act." *Diamond Game Enterprises*, 230 F.3d at 367.

Finally, in *United States v. 103 Electronic Gambling Devices*, 223 F.3d 1091 (9th Cir. 2000), the government brought an *in rem* civil forfeiture action against MegaMania devices. As with the cases discussed above, the court harmonized IGRA and the Johnson Act and did not apply a "repeal by implication" analysis. *See id.* at 1102. The court noted that "while [absent a tribal-state compact or secretarial procedures] complete, self-contained electronic or mechanical facsimiles of a game of chance, including bingo, may indeed be forbidden by the Johnson Act after the enactment of IGRA . . . we hold that mere technologic aids to bingo, such as the MegaMania terminal, are not." *Id.* at 1102. In so holding, the court "maintain[ed] fidelity to two entrenched canons of statutory construction: (i) courts should give effect to both of two statutes covering related or overlapping subjects, and (ii) a specific statute governs a general one." *Id.* (citations and parentheticals omitted). The court's conclusion gave effect to "Congress's most recent relevant word on gaming . . . that aids to bingo are legal in Indian country." *Id.* Interestingly, "[t]he Government conceded . . . at oral argument . . . that the court *should 'read the two acts harmoniously; if it's a bingo*

aid, it's not a Johnson Act gambling device.'" Id. at 1102 n. 13 (emphasis added).

These cases embody the circuits' successful efforts to harmonize IGRA and the Johnson Act. The courts have done so in a way that has led to consistent, predictable results.[2] Thus while the DOJ labors to find a conflict between the circuits, this case does not "involve principles the settlement of which is of importance to the public as distinguished from that of the parties," for here there is no "real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal." *Layne & Bowler Corp. V. Western Well Works*, 261 U.S. 387, 393 (1923).

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[2] The other side of the Class II/Class III line has been demarcated with equal clarity. Just as the cases discussed above have consistently held that electromechanical pull-tab dispensers and electronic bingo aids are Class II, so too have the courts consistently held that electronic games where players play directly against the machine, and where the machine itself generates and applies the outcome – determinative element of chance, to be Class III. *See, e.g., Spokane Indian Tribe v. United States*, 972 F.2d 1090, 1093 (9th Cir. 1992) (because the Pick 6 game at issue in the case involved only "a single participant play[ing] against the machine," it was an electronic facsimile rather than an aid, was thus Class III and required a compact); *Sycuan Band v. Roache*, 54 F.3d 535, 542-43 (9th Cir. 1995) (concluding electronic pull-tab game in which one played against machine was exact, self-contained, copy of paper version of game and was thus a Class III electronic facsimile); *Cabazon Band of Mission Indians v. National Indian Gaming Commission*, 14 F.3d 633, 636 (D.C. Cir. 1994) ("the Act's exclusion of electronic facsimiles removes games from the Class II category when those games are wholly incorporated into an electronic or electromechanical version."). *Compare* 25 C.F.R. § 542.8 (h) (NIGC's Minimum Internal Control Standards regarding electronic equipment used in pull-tabs) with 25 C.F.R. § 542.13 (NIGC's control standards for gaming machines).

Given the lack of any split among the circuits, either in outcome or in analytical approach, the Court should deny the instant petition.[3]

II. *United States v. Wilson* is Distinguishable on its Facts and Carries No Persuasive Weight

The DOJ's claimed conflict with *United States v. Wilson*, 475 F.2d 108 (9th Cir. 1973), does not withstand scrutiny. The machine at issue in *Wilson* functioned in a fundamentally different way than the Lucky Tab II game at issue here. The Ninth Circuit's Johnson Act analysis in that case is fact-bound and does not conflict with the Eight Circuit's holding with respect to Lucky Tab II.

The question in *Wilson* was whether any element of chance existed in a so-called "Bonanza" machine. According to the Ninth Circuit's opinion, the Bonanza machine accepted a customer's quarter in exchange for a coupon which was visible through a window in the machine. After purchasing the visible coupon, another coupon would become visible. Precisely how the machine selected the next coupon to become visible – and to what extent such selection depended on the machine's application of an element of chance – is not entirely clear from the opinion.

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[3] This clarity in distinguishing Class II aids from Class III facsimiles established by the cases discussed above has been enhanced by the NIGC's recent publication of final rules refining the regulatory definitions of key terms "electronic, computer or other technologic aid," "electronic or electromechanical facsimile," and "game similar to bingo." 67 Fed. Reg. 41166 (June 17, 2002).

The court affirmed the district court's conclusion that "most players put their first 25 cents in the 'Bonanza' machine because of the 'element of chance' that the next coupon, thus exposed, would entitle them, for another 25 cents, to a guaranteed payment of 50 cents to $31.00." *Id.* at 109. Thus, the court simply found that the window feature provided "the application of an element of chance" in the device. 15 U.S.C. § 1171(a)(2). The opinion is silent as to any other potential element of chance that may have existed in the device.

Wilson is thus distinguishable on its facts, as the element of chance in the Lucky Tab II game here is not applied by the vending machine, but rather by the pre-printing of the pull-tabs. *See Santee Sioux Tribe*, 324 F.3d at 612. The same is true as to the pull-tab dispenser at issue in *Seneca-Cayuga Tribe*. *See* 327 F.3d at 1040. The Johnson Act applies differently to these different types of machines; there is no conflict.

Moreover, *Wilson* carries little or no persuasive weight. It is a *per curiam* opinion of only seven paragraphs, contains a sparse factual record and minimal analysis, did not involve Indian country, and predated IGRA by some 15 years. Thus is it not surprising that *Wilson* has not, to our knowledge, been relied on or cited by any published opinion in the more than thirty years since it was decided.

III. Gaming Classification Determinations Are Inherently Fact-Bound

Determining where a particular game or device falls within established gambling laws is an inherently fact-bound endeavor. Every aspect of the particular game or

device at issue must be examined in substantial detail. The precise sequence of each event can matter, as does the manner in which each element of the game is conducted. The courts in these cases consider such factors as: how and where the element of chance that decides winners and losers is determined and applied; whether an individual player plays directly against the machine, or whether the player plays against other players; whether or not the Tribe is a participant in the game; what components are included in the machine and the function of each; and the speed of play, among others.

As a result, the judicial opinions in this area inevitably include extensive, detailed factual descriptions of the games, methodology, and equipment at issue. *See, e.g., Seneca-Cayuga Tribe*, 327 F.3d at 1024-27; *Santee Sioux Tribe*, 324 F.3d at 610; *162 MegaMania Gambling Devices*, 231 F.3d at 716-17; *Diamond Game Enterprises, Inc.*, 230 F. 3d at 367-68; *103 Electronic Gambling Devices*, 223 F.3d at 1093-94 & nn. 1-3; *Cabazon Band of Mission Indians v. NIGC*, 14 F.3d 633, 635 (D.C. Cir. 1994). These particulars are invariably tightly woven into the courts' analysis and the resulting outcomes. *See, e.g., Seneca-Cayuga Tribe*, 327 F.3d at 1040-417; *Santee Sioux Tribe*, 324 F.3d at 610; *162 MegaMania Gambling Devices*, 231 F.3d at 724-25; *Diamond Game Enterprises, Inc.*, 230 F.3d at 369-70; *103 Electronic Gambling Devices*, 223 F.3d at 1093-94 & nn. 1-3.

For example, in this case the Eighth Circuit observed that the device at issue is "essentially a computer," *Santee Sioux Tribe*, 324 F.3d at 610, with "a manual feed for money, a roll of paper pull-tabs, a bar code reader to read the back of each pull-tab, a rubber roller to dispense the pull-tabs, a cutter which cuts the pull-tabs from the roll,

and a cash drawer." *Id.* The bar code reader reads the pull-tab as it passes through the machine to the player, and based on this reading, a video screen displays the results of the play. The machine also emits different sounds, depending on whether it has read a winning or losing ticket. *See id.*

Play begins with a player inserting money into the machine. The player presses a start button, which is followed approximately two-and-a-half seconds later by an animated display. The machine dispenses the paper pull-tab to the player. The player can pull back the paper tab to verify the results of the play. The machine does not pay prizes to winners, make change, or give credits for accumulated wins. The device instructs the player to go to the cashier and present the pull-tab to redeem winnings. *See id.*

The pull-tabs are small, preprinted, two-ply paper cards. The player peels off the top layer to reveal symbols and patterns that show the results of the play. The pull-tabs also indicate the number manufactured, game type, and include a unique sequence number. An encrypted bar code is printed on the back of the pull-tab. Play results are determined by scanning the bar code with a laser light, after which the manufacturer's proprietary software reads the encrypted data on the bar code. "[A]nti-tampering devices ensure that a pull-tab that has already been scanned will be rejected and that the tabs will be dispensed in the correct sequence." *Id.* The device cannot operate, neither accepting money nor displaying symbols, without a roll of paper pull-tabs in place. *See id.*

As this case illustrates, game and equipment classification determinations are inevitably factually driven. *See, e.g., 162 MegaMania Gambling Devices*, 231 F.3d at 716 ("At the heart of this dispute is the nature of the game"). Resolving this case as to this one machine will not provide the government or the tribes with substantially helpful guidance as to the next game or device to hit the market. That next case will turn largely on the particular facts related to that future game and the equipment designed for its play. Supreme Court review in this case is therefore unwarranted.

IV. The DOJ's Claimed Fears Regarding Gambling Regulation Outside of Indian Country Are Overblown

The DOJ's purported fears regarding the potential impact of the circuit court's decision outside of Indian country are overblown. Even if the Johnson Act's definition of a gambling device was perceived to be narrowed when harmonized with IGRA, as the DOJ fears, the underlying gaming activity outside of Indian Country would still need to be authorized by some statute analogous to IGRA. Moreover, the DOJ's petition ignores the extensive matrix of federal laws empowering it to control illegal gambling. *See, e.g.,* 18 U.S.C. §§ 371 (conspiracy to run gambling business), 981-82 (civil and criminal forfeiture statutes), 1166 (making state gambling laws applicable to Indian country under certain circumstances), 1301-04 (importing, transporting, mailing lottery tickets, broadcasting lottery information), 1952 (use of interstate mail to carry on an illegal gambling business), 1953 (prohibiting interstate transportation of wagering paraphernalia), 1955 (prohibiting illegal gambling business), 1956-57 (money laundering

and illegal transactions with criminally derived funds from illegal gambling business), 1961 (RICO); 26 U.S.C. § 4401 (federal taxes on those accepting both authorized and unlawful wagers). In short, the Eighth Circuit's decision below is irrelevant to the regulation of unlawful gambling outside of Indian country.

CONCLUSION

For these reasons the Tribe respectfully requests that the Court deny the petition.

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